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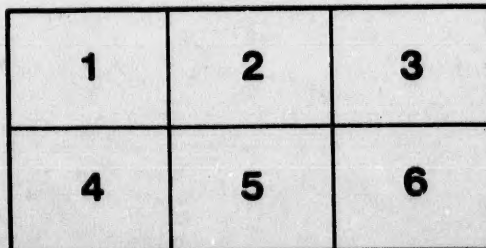
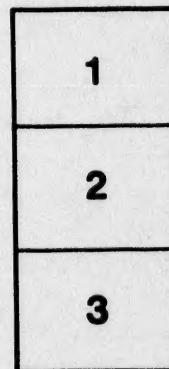
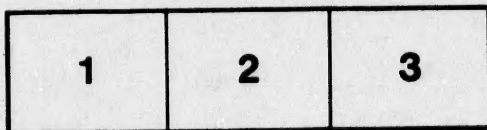
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23

IMPORTANT TO AMERICAN LAWYERS

FROM THE ENGLISH, IRISH, SCOTCH AND CANADIAN
LAW REPORTS

WITH

NOTES AND REFERENCES

VOL. XV

EDITED BY

JOHN F. GEETING

LECTURER AT THE ILLINOIS COLLEGE OF LAW, THE CHICAGO-KENT
COLLEGE OF LAW AND THE JOHN MARSHALL LAW SCHOOL

AND

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CHICAGO

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PREFACE

We announced in our preface to Vol. 12, that four volumes would be devoted to the decisions of four and one third years. We then expected to complete the set much sooner; but various complications, such as surround the practicing lawyer, delayed the work.

Editing a volume of Criminal Reports, is not an easy task, when a pair of shears is not the principal factor, and when the notes are not taken from digests prepared by others. We have not moved with the winged speed of, or cited as many cases as, the mechanical quick compiling editors; but we have endeavored to give the law, and not empty decisions. One of the burdens resting on the profession of the law today, is the steady increase of law reports, expensive to the practicing lawyers and confusing to the courts. As long as judges will waste time and paper with wordy decisions, the rapid increase of general reports will continue; but reports on special subjects, to be of assistance to lawyers should be clear, concise, and comprehensive. To effect this has been our aim, and if at times we have dwelt at length on any topic, it was because of its special importance.

In this volume we would call special attention to; The Letter of Abraham Lincoln on the Traylor Case; The Reprint of the Boorn Case; The Subject of Judicial Reprieves, and our notes on conspiracy.

J. F. G.

Norwood Park, Chicago,
August, 1909.

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NOTE—The original design of a Table of Topics was to make an
index to the principal subjects, appearing in the headlines to reported
cases; but considerable difficulty was experienced from the fact that
the headlines, having been written by various editors, lack uniformity.
The reader should use the General Index in Volume X in connection
with this Table.

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AMERICAN CRIMINAL REPORTS

STATE v. ROBERTS.

50 W. Va. 422—40 S. E. Rep. 434.

Decided December 7, 1901.

ACCESSORY—PRACTICE—VARIANCE—RES GESTAE: *Who is an accessory—Indicted as principal; but proof that of an accessory—Joint indictment, separate trials—Res gesta—Motion for a continuance—Instructions—Record as to empaneling of grand jury and returning of the indictment—Certiorari.*

1. Upon a joint indictment for felony against several persons, any defendant may elect, under section 8, c. 159, Code, to be tried separately, but is not entitled to demand to be tried jointly.
2. Where a person is indicted jointly with others as principal in the commission of a robbery, it is error to instruct the jury that in case they believe from the evidence, beyond a reasonable doubt, that the defendant on trial conspired with the co-defendants, or any one of them, to commit the offense, they should find him guilty, although he may not have been present at the time the robbery was committed.
3. A conspirator who is absent at the time the felony is committed, taking no part in the actual commission of the offense, is an accessory before the fact, and can only be indicted and punished as such.
4. Such accessory may be indicted either with the principal or separately, but in either case he must be indicted as accessory, and not as principal.
5. An accessory before the fact to a felony cannot be convicted on an indictment against him as principal.
6. The record of the finding of the grand jury is essential, as the only legal proof of the finding of the indictment, and without such record the indictment cannot be maintained.
(Syllabus by the Court.)
7. A motion for continuance is addressed to the sound discretion of the judge, and his ruling on it will not be reversed, unless clearly erroneous.

- (Additional Syllabus by J. F. G.)

Error to the Circuit Court of Mingo County; Hon. E. S. Doolittle, Judge.

F. H. Evans and J. L. Stafford, for the plaintiff in error.
Romeo H. Freer, Attorney General, and *Alex Dulin*, for the State.

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nesses present that knew the same facts that Mounts knew or not, and that Roberts did not know what witnesses he had there. On re-direct examination he was caused to say that he had no other witnesses that he could prove the same facts by that he expected to prove by said Mounts. As to the other witnesses, Hatfield lives on the opposite side of the river, in Kentucky; and James Roberts, brother of the defendant, says he served notice on him to appear as a witness; that he came over on the West Virginia side to be served, and said he would attend, and that he was a good friend to the defendant. The witness James Roberts was asked whether he had made any effort to get Bub Elswick. He said that he had sent his brother after him; that his brother got him, but he got away from him. His brother Coz Roberts testified: That he had a *subpoena* for Bub Elswick. That he went up about a mile and a half above Panther to get him. He brought him to Gray, intending to bring him on to the place of trial, when he said he wanted to talk to Mr. Ried, the hotel man at Gray. He went across the walk, and went away somewhere. Witness did not know where. He hunted and inquired for him, but failed to find him or get any further information about him. Doreas Johnson, the defendant's sister, was not summoned. Defendant had notified her that he would have to use her as a witness, but some time before the trial she had gone off, and her father or mother did not know, in particular, where she was. He supposed her husband knew where she was, and he was probably with her. The defendant admitted that he might have stated a short time before the trial that he did not expect to try the case at that term. Evidently, from the character of the testimony in support of the motion for a continuance, the trial court was satisfied that the apparent effort made on part of defendant to get ready for trial was simply a subterfuge to get ready for a continuance. "A motion for continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and though an appellate court will supervise the action of an inferior court on such motion, it will not reverse the judgment on that ground unless such action was plainly erroneous." *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224 (Syl., point 7); *State v. Lane*, 44 W. Va. 730, 29 S. E. 1020; *Hewitt's Case*, 17 Grat. 627.

It is insisted that the court erred in compelling the prisoner to be tried separately, when he demanded to be tried jointly with James Roberts, one of the parties with whom he was jointly indicted—the defendants Edmond Murphy and Thomas Hardin having been tried prior thereto—and cites in support of his proposition section 8, c. 159, Code, which provides, "If persons jointly indicted elect to be, or are tried separately, the panel in the case of each, shall be made up as provided in the third section of this chapter." This provision entitles the defendant to elect to be tried separately, if he so chooses, but not to demand to be tried jointly. In *Curran's Case*, 7 Grat. 619 (Syl., point 6), it is held, "Upon a joint indictment against several, the Commonwealth may elect to try them separately." *State v. Nash*, 7 Iowa, 347; *Cruce v. State*, 59 Ga., 83; *Paiterson v. People*, 46 Barb. 625.

Defendant claims that court erred in giving instructions Nos. 1, 2, and 3 asked by the State, and refusing to give instruction No. 4 asked by the prisoner, and by giving instructions 1 and 3 as modified by the court. Instruction No. 1 asked by the State is as follows: "The court instructs the jury that if they believe from the evidence of this case, beyond a reasonable doubt; that the prisoner, Jacob Roberts, and Malan Prater, James Roberts, Thomas Hardin, and Edmond Murphy, or any two of them, the prisoner being one, entered into a conspiracy for the purpose of robbing B. C. Bateman, the party named in the indictment in this case, of his money, and that in pursuance of said conspiracy and agreement Thomas Hardin and Edmond Murphy, they, or either of them, being armed with a deadly weapon, to-wit, a loaded gun, assaulted the said B. C. Bateman and put him in bodily fear; shot and wounded him, and by force took from the person of the said B. C. Bateman a certain sum of money mentioned and described in the indictment in this case; and did feloniously and violently steal, take and carry away said money, then you should find the prisoner guilty, although the prisoner may not have been present at the time the money was so taken from the person of the said B. C. Bateman." This is a joint indictment against all the defendants named therein as principals. As stated in 4 Shars. Bl. Comm. p. 33: "A man may be principal in an offense in two degrees. A principal in the first degree is he that is the actor or absolute perpetrator of the crime; and in the second degree, he is who is present, aiding

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and abetting the fact to be done—which principal need not always be an actor immediately standing by, within sight or hearing of the fact; but there may be also a constructive presence, as when one commit a robbery or murder, and another keeps watch or guard at some convenient distance. * * * In case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it who is ignorant of its poisonous qualities, or giving it to him for that purpose, and yet not administering it himself, nor be present when the very deed of poisoning is committed. And the same reasoning will hold good with regard to other murders committed in the absence of the murderer by means which he had prepared beforehand, and which probably could not fail of their mischievous effect—as by laying the trap or deadfall for another, whereby he is killed, letting out a wild beast, with an intent to do mischief, or inciting a madman to commit murder, so that death thereupon ensues. In each of these cases the party offending is guilty of murder, as a principal in the first degree. * * * An accessory is he who is not the chief actor in the offense, nor present at its performance, but is some way concerned therein, either before or after the fact committed.” Section 8, c. 152, Code, provides: “An accessory, either before or after the fact, may, whether the principal felon be convicted or not, or be amenable to justice or not, be indicted, convicted, and punished in the county in which he became accessory, or in which the principal felon might be indicted. Any such accessory before the fact may be indicted either with such principal or separately.” An accessory must be indicted as such, whether indicted with the principal felon or separately. In *State v. Lilly*, 47 W. Va. 496, 35 S. E. 837 (Syl., point 2): “Under the laws of this State, to convict a person as an accessory to crime he must be indicted and tried as such.” And in *Hatchett's Case*, 15 Va. 925, it is held: “An accessory to a felony cannot be prosecuted for a substantive offense, but only as an accessory to the crime perpetrated by the principal felon.” *Thornton's Case*, 24 Grat. 657: “An accessory before the fact to a felony cannot be convicted on an indictment against him as principal.”

The instruction complained of is given upon the theory that the proof against the defendant is to sustain the charge against him as an accessory, and not principal, and he not being indicted

as an accessory, but as principal, the instruction is wrong. The instruction charges the jury that if they find that in pursuance of said conspiracy, entered into by all of the defendants, or any two of them, the prisoner being one, Thomas Hardin and Edmond Murphy, they or either of them being armed with a deadly weapon, to-wit, a loaded gun, assaulted the said Bateman, and put him in bodily fear, and by force took from his person the money described in the indictment, and did feloniously and violently steal, take, and carry away said money, then they should find the prisoner guilty, although the prisoner may not have been present at the time the money was so taken from the person of the said Bateman. "An accessory before the fact is he that, being absent at the time of the actual perpetration of the crime, procures, counsels, commands, incites, or abets another to commit it." 1 Enc. Pl. & Prac. 66. The crime of accessory before the fact is a particular one. The absence of the accessory at the time and place of the principal offense is an essential element of the crime. Sir Mathew Hale defines the accessory before the fact to be "one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Wherein absence is necessary to make him an accessory."

Instructions Nos. 2 and 3 given for the State are as follows: "No. 2. The court instructs the jury that they are not required by law to disbelieve a witness who has testified before them in this case because the general reputation of such witness for truth and veracity in the neighborhood where he resides has been proven to be bad, and said witness shown not to be entitled to credit when on oath; but it is the province of the jury to give the evidence of any witness who has testified in this case such credit as the jury may believe, from all the facts and circumstances in the case, it is entitled to; the jury being the sole judges of the evidence in the case, as well as the credibility of the witnesses who have testified in this case. No. 3. The court instructs the jury that they are the sole judges of the evidence in this case, as well as the credibility of the witnesses testifying before them, and, in determining the weight to be given to the evidence of any witness who has testified in this case, they have the right to take and consider the intelligence of such witness, his or her conduct, appearance, and demeanor while testifying, as well as the interest such witness may have in the result of

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the trial, and from all these and all other facts and circumstances in the case give the evidence of such witnesses such credit as the jury may believe it entitled to; the jury being the sole judges of the evidence and the weight thereof, as well as the credibility of the witnesses who testified in the case,"—and propounds the law in relation to the character of witnesses, and the fact that the jury are the sole judges of the evidence in the case, as well as the credibility of the witnesses who have testified.

Instruction No. 4 asked for by defendant is as follows: "The court further instructs the jury that, before they can find the prisoner guilty, they must be satisfied beyond all reasonable doubt, from the evidence adduced in this case, that a conspiracy existed, and that the prisoner, Jacob Roberts, conspired and confederated with Thomas Hardin and Edmond Murphy in the commission of the offense charged in said indictment." This instruction is asked on the theory that the defendant is being prosecuted as an accessory before the fact, while he is indicted as principal; and to have made it good in that case, after the name Murphy "or one of them" should have been inserted in the instruction. The defendant's instruction No. 1: "The court further instructs the jury that, before they can find the defendant Jacob Roberts guilty as charged in the indictment, they must believe beyond all reasonable doubt, that he entered into a conspiracy and confederation with Thomas Hardin, Edmond Murphy, Malan Prater, and James Roberts, or any two of them, for the purpose of robbing B. C. Bateman, and in pursuance of such conspiracy said Bateman was robbed, and that such belief must be founded upon the evidence adduced before them in the trial of this case"—was properly modified by the court by striking out "or any of them," and inserting in lieu thereof "or any one of them," and inserting after the word "robbed" the words "as charged in the indictment."

The defendant's third instruction is as follows: "The court further instructs the jury that in arriving at a verdict in this case, that they are the sole judges of the facts, and credibility of each and every witness introduced in said case, and that they have the right to disregard the testimony of any witness or witnesses that have testified in the said case, and may take into consideration the character and motive for the testimony of each and all of said witnesses,"—was refused and modified and given as follows: "The court further instructs the jury that in arriv-

ing at a verdict in this case, that they are the sole judges of the facts and credibility of each and every witness introduced in this case, and that they have the right to disregard the testimony of any witness or witnesses who, in the opinion of the jury, may have testified falsely in this case, or give to the testimony of any such witness such weight as, in the opinion of the jury, the same may be entitled to, and in ascertaining such weight the jury may take into consideration the character and motive of the witnesses as disclosed by the evidence in this case." The modification was proper. The instruction as offered by the defendant was too sweeping, as it was to the effect that the jury had the right to disregard the testimony of any witness or witnesses that had testified in the case, without any qualification whatever, which they could not have a right to do, and it was properly refused in the shape in which it was offered.

The second assignment is that the court erred in permitting improper evidence to go before the jury, as will appear from Bill of Exception No. 3. This bill of exception is that which contains all the evidence in the case, and exceptions to certain questions and answers are noted throughout the evidence. This matter is referred to in plaintiff's brief, but calls attention to no particular part of the evidence, except that he says: "The defendant offered to prove certain statements made by Bateman, the wounded man, immediately after the robbery, which the court refused to permit, to which ruling of the court the defendant excepted. The circumstances in the case all show that these remarks made by Bateman at that time are *res gestae*, and the court erred in refusing to permit the same to go to the jury."

The evidence refused by the court to be given was that of James Roberts, on behalf of the defendants: "Q. Did you have any conversation with Bateman? A. Yes, sir; I asked him if he was dead. He was lying flat on his belly and on his face, and he turned his face up and said, 'No.' I said, 'Stranger, are you dead?' and he said, 'No.' Q. Did you have any other conversation with him? A. Yes, sir. Q. What was it?" To which last question the counsel for State objected, and the objection was sustained, and the defendant excepted. Defendant then asked: "Did Mr. Bateman, upon that occasion, say to you that Thomas Hardin and Edmond Murphy had gotten his money, and that he wanted you and Jake to go and try and get his money back from them?" Objection sustained, and defend-

ant excepted as it was while the object to have admitted.

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ant excepted. The first objection should have been overruled, as it was a general question as to what the conversation was, while the last question suggested the answer to the witness, and the objection was properly sustained. This conversation seems to have been within a few minutes after the robbery was committed.

The fifth assignment, that the court erred in refusing to set aside the verdict of the jury and grant a new trial because the verdict was contrary to the law and the evidence, it is not necessary here to discuss, as the case will, at any rate, have to be remanded for a new trial.

The seventh assignment is that the court erred in refusing to set aside the verdict for the reason that the prisoner was convicted as principal, when, as a matter of fact, if there was any evidence against the prisoner, it only tended to show that he was an accessory before the fact, and not principal. When Bate-man, the victim of the robbery, was on the stand, he was asked: "When you started to go across the river, did anybody take you or go with you?" A. "Yes, sir." Q. "Who?" A. "There was Jim Roberts, Malan Prater, Thomas Hardin, and, as well as I can recollect, Murphy." Q. "What occurred when you got across the river—over on this side of the river—on West Virginia?" A. "I was shot and robbed." On cross-examination he was asked: "Was Jim or Jake Roberts there at the time you were shot?" A. "Jim had just turned away—he and Malan Prater." Q. "Who first came to you after you were shot?" A. "Jim Roberts or Jake—one, I disremember which. Both of them came." Thomas Hardin, witness for the State, was asked: "Tell the jury whether or not, Mr. Hardin, you shot this man." A. "Yes, sir; I did." Q. "Who was present at the time you shot him?" A. "Edmond Murphy." Q. "What happened at that time? Just tell the jury what took place at the time you shot him." A. "When I shot him, Mr. Murphy cut his money off of him, and taken it and divided it up with me." The evidence, taken all together, pretty well sustains the seventh assignment of plaintiff in error.

The defendant demurred to the indictment, and moved to quash the same, both of which motions were overruled. The indictment is good on demurrer, but there was no order in the record showing the finding of the indictment. The record starts out simply with the certificate of the clerk "that the grand

jurors impaneled and sworn in the Circuit Court of Mingo County, at the term thereof commencing on the 6th day of May, 1901, in and for the body of said county, and attending said court, found an indictment against the defendant Jacob Roberts for a felony which, with the indorsement thereon by the foreman, 'A true bill' is as follows, to-wit." So it does not appear from the record that there was either an order impaneling the grand jury, or an order finding the indictment by the grand jury. In *State v. Gilmore*, 9 W. Va. 641 (Syl., point 2), it is held: "The record of the finding of the grand jury is as essential as the record of the verdict of a jury, as it is the only legal proof of the finding of the indictment." It is never improper to give in the record the order impaneling the grand jury.

When the finding of an indictment is made by the grand jury on a subsequent day to that on which they are impaneled, and where the record shows the finding of the indictment by the grand jury, the order referring to the act of the grand jury in returning the indictment into court would be sufficient; but this, at least, must be shown. Where this is shown by order of the court, the regular impaneling of the jury will be presumed. In the case at bar a writ of *certiorari* would have been issued by this court to bring up the finding of the grand jury, but for the fact that the case must be remanded for a new trial, and, if the record fails to show the finding of the indictment by the grand jury, the indictment should be quashed.

The verdict is set aside, and the case remanded for a new trial to be had therein.

STATE V. EPSTEIN.

25 R. I. 131—55 Atl. Rep. 201.

Decided April 22, 1903.

ADMISSIONS THROUGH SILENCE—HEARSAY TESTIMONY—RES GESTÆ:
Silence by persons under arrest, not admissions of truth in statements made in their presence and hearing—Statements made through an interpreter, hearsay testimony—Statements made by victim immediately after injury part of the res gestæ.

1. Silence on part of a person under arrest is not an admission of truth in statements made in his presence and hearing.

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2. Statements made in a foreign language, out of court, though part of the *res gesta*, or at least admissible in evidence, can only be proved by a person or persons who heard them and understood the language in which they were spoken.
3. It was error to permit witnesses to testify to statement made to them through an interpreter, even though no objection was made; such matters coming to them through an interpreter were hearsay and not competent to be admitted in evidence.
4. Statements made by the victim of a serious assault, in relation thereto, and so immediately thereafter as to rebut all inference of calculation, to persons who came to his assistance, are admissible as part of the *res gesta*.

Supreme Court of Rhode Island.

Max Epstein, convicted of murder, petitions for a new trial.
Petition granted.

Charles F. Stearns, Attorney General, for the State.

Francis I. McCanna and *Thomas Z. Lee*, for the defendant.

TILLINHAST, J. The defendant, who, on the 21st day of December, 1901, was convicted of the crime of murder, now petitions for a new trial on various grounds, amongst which are certain alleged erroneous rulings of the trial court in the admission and rejection of testimony.

The following statements will serve to show the relation and situation of the parties to the homicide in question shortly before and at the time when the fatal injury was inflicted, together with the substance and character of the testimony objected to.

On the night of July 26, 1901, the defendant, in company with Abraham Zarrinsky, the person whom the defendant is alleged to have murdered, went to the attic room where Zarrinsky lived, at No. 2 Bullfinch Court, Providence, where they remained for a few minutes and then went together to the defendant's boarding-place. Finding the door locked, Zarrinsky invited the defendant to return and lodge with him in his room, which invitation the defendant accepted. This room was in the attic of a two and one-half story house, and was about fourteen feet in length and about twelve feet in width. The parties were fellow workmen and were on friendly terms at the time. Zarrinsky had in his possession about two hundred dollars in money, which he carried in a bag on his person. When

the parties entered Zarrinsky's room for the night, he locked the door, according to the testimony of the defendant, and put the key in his pocket. He then took two drinks from a bottle of alcohol, as the defendant testifies, and invited him to drink therefrom, but he declined. At about 2:30 o'clock on the next morning a man named Kwasha, who occupied the tenement beneath Zarrinsky's room, heard a noise in said room, and heard a call for help. He did not recognize the voice, but shortly afterwards Zarrinsky came down stairs and said that the defendant had taken his money and gone out. Kwasha then ran out and found the defendant lying on the ground between the house and the fence, quite badly injured. His collar-bone was fractured, he had a cut on his head, was bleeding from one ear, and appeared to be in great pain. During the combat in the room Zarrinsky was heard by some of the people below to cry out, "What are you licking me for; you have got my money!" And on being asked by Barnett Kwasha, from the window of the room below, what was the matter, Zarrinsky replied: "There is murder up here; he is taking my money and is licking me." Shortly afterwards Zarrinsky brought down pieces of a broken bottle and said, in the presence of the defendant, who was then lying on the ground where he had fallen: "With this bottle he struck me." He also said that the defendant had taken his money, whereupon the defendant answered, "I ain't got the money." Zarrinsky was pale and had marks on his head, and the defendant, in addition to the injuries above specified, had an injury on his side.

Both parties were then taken in custody by the police, placed in the patrol wagon and taken to the police station, where the defendant was laid upon the floor and Zarrinsky was seated in a chair. Shortly afterwards, Dr. Griffin, the police surgeon, was called to the police station, where he examined the injured parties; and they were then removed to the Rhode Island Hospital, where Zarrinsky died, from the effects of the injury received in said combat on the morning of July 28, 1901.

While the defendant and Zarrinsky were in the custody of the officers at the police station, Zarrinsky, in answer to questions propounded to him through an interpreter by the officers, in the presence of the defendant, made certain accusations against him, to most of which he made no reply; and the prosecution was permitted, against the defendant's objection, to

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prove the making of these accusations, together with the fact that the defendant made no reply thereto.

The principal accusations made by Zarrinsky, according to the interpretation thereof by some one who was present, were as follows: "He has got \$90 in gold and \$135 in bills." Zarrinsky told how Epstein came and asked him to take him up to sleep in his room, and that he did so, and that the defendant licked him and wanted to take his money. In answer to the question: "What did Mr. Epstein then say, if anything?" the witness answered: "The lieutenant questioned Mr. Epstein and he said he was sick and could not answer him." In cross-examination counsel for the defendant questioned the witness with relation to what took place at the police station, and the following information was adduced: "Q. Well, do you remember anything the defendant said at the police station? A. I remember Mr. Epstein saying 'Don't bother me, I am not able to answer you.'" This was said in Jewish; it was said to a man who was a Jew, and he translated it to the captain.

Lieutenant Edward O'Neill testified that the defendant was lying on the floor at the time of said conversation, and that he appeared to be suffering. Witness noticed blood oozing from the left ear, and he appeared to be in pain. "Q. And his injuries seemed to take up most of his attention? A. I should judge they did. Q. Who else were in the room? A. There were quite a number, I don't know who they were; three or four officers in uniform." The officer further testified that when he asked defendant where Zarrinsky's money was, he replied: "I am sick, and I don't understand."

The officer further testified that defendant had said nothing at all up to that time in his presence; also that Zarrinsky said that he and defendant went to bed together, and that subsequently he waked up and found Epstein going through his pockets and taking his money, and that he (Zarrinsky) got up and called to him to give up his money, whereupon Epstein struck him with a bottle. "He hit me on the head with the bottle, and he kill me." The officer asked him how much money he had, and he told him that he had something over \$200, he could not tell the exact amount, but there were \$90 in gold; there were \$10 gold pieces, and there were \$20 gold pieces. The officer then asked Zarrinsky if he struck Epstein, and he said: "No,

I want my money. He broke the bottle on my head, and jumped out of the window.' * * * I asked him what Epstein did with the money. He pointed out to me and said: 'He put it in that pocket.' I went to Epstein's left pocket and found a pocketbook which contained about \$2 in silver. Before I said anything, Zarrinsky said: 'That is not mine.' I looked in the other pocket and found nothing." The officer further testified that he went to the room where the combat occurred, and found the money bag lying on the floor near the window where the defendant went out; that he took this money to the station, and Zarrinsky said it was his when he saw the bag. The officer then asked defendant again what he did with Zarrinsky's money, and he replied: "I am sick. I don't understand." Zarrinsky then stated again to the officer how Epstein got out of the room; that he ran from him, when he broke the bottle on his head, and jumped out of the window; and that to this latter statement Epstein replied that Zarrinsky pushed him out, which statement Zarrinsky denied.

Dr. Clifford H. Griffin gave his first attention to the defendant when he arrived at the police station on the morning of July 27th. He says: "I found Mr. Epstein lying on the floor of the room, with his feet towards the door and his head towards a man sitting in a chair who was Zarrinsky. I first gave my attention to the man on the floor. I made an examination. He seemed to be in considerable pain, and in taking hold of his hand or arm to examine his pulse he complained of pain in his shoulder. * * * I found him bleeding from the nostrils and left ear. There was a fracture of the left clavicle, a lacerated wound on the left thumb, contusions about the left elbow, and an abrasion along the outer side of the left arm. He was conscious." Q. "Did you talk with Mr. Epstein?" A. "Not more than to get his name and what is on this piece of paper." Q. "Did he speak English?" A. "He said that he understood when I asked him his name and age. He seemed to speak with some difficulty." The doctor was then allowed to testify as to charges made by Zarrinsky against the defendant, who was lying on the floor, similar to those already detailed and testified to by the witnesses Kwasha and O'Neill. The statements testified to by the doctor as being uttered by Zarrinsky were the result of personal interrogatories put to Zarrinsky by Dr. Griffin in his capacity as a physician. He testified that he did

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not know whether Epstein heard the statements or not, and that he (witness) spoke through an interpreter.

Other persons who were present at the police station when these various conversations were had with Zarrinsky were also permitted to testify as to the charges which he made against the defendant and as to the defendant's silence during most of said conversations.

Without further specifying in detail the particular language which was used by the police officers and others in interrogating Zarrinsky and in giving his replies thereto, it is sufficient to say that said interrogatories and answers substantially covered the entire transactions which took place between Zarrinsky and Epstein, as related by the former, from the time when they entered the attic room in question to the time when both the defendant and Zarrinsky were placed in the patrol wagon, after the combat in question, for the purpose of being carried to the station; that is to say, Zarrinsky was freely interrogated by several persons, after arriving at the police station in company with the defendant, as to the acts which were committed by the latter, according to the version thereof as given by Zarrinsky. The accusations thus made against the defendant were to the effect that he had robbed Zarrinsky of his money, that he had struck him on the head with a bottle, and had caused him all the physical injuries from which he was then suffering; and it appears that when most of these accusations were made the defendant remained silent.

The question raised is whether this testimony was admissible. The authorities bearing upon this question are not harmonious. One class of cases holds that the fact that the accused is in custody when the charges are made against him, while entitled to weight, will not of itself exclude such statements, if the circumstances were such as properly called for a reply. Amongst the cases which take this view are *Kelley v. People*, 55 N. Y. 565, 14 Am. Rep. 342; *State v. Murray*, 126 Mo. 611, 29 S. W. 700; *State v. Dillon*, 74 Iowa, 653, 38 N. W. 525; *Green v. State*, 97 Tenn. 50, 36 S. W. 700; *Murphy v. State*, 36 Ohio St. 628. Greenleaf on Evidence seems to take the same view. See volume 1 (16th ed.) § 197.

The other class of cases holds that the silence of a party while under arrest, when charges or accusations are made

against him, cannot be used as sustaining the hypothesis of acquiescence therein.

1. We are of the opinion that the rule laid down in this class of cases is the more reasonable one, and we have therefore decided to follow it.

It is clearly the right and privilege of a party in such circumstances to remain silent, and the fact that he does so ought not to be allowed to raise any inference against him. The defendant in the case at bar, even if he heard and comprehended the import of the accusations made against him by Zarrinsky, which is certainly extremely doubtful, to say the least, was not called upon to reply to or contradict the same. *Com. v. McDermott*, 123 Mass. 440, 25 Am. Rep. 120. Being in the custody of officers of the law, his silence practically ought to have no more effect, as bearing upon his guilt, than it would have had if maintained by him while under examination in the District Court upon formal charges. In such a case it would be clear that he would not be bound to admit or deny what might be said by the witnesses, and that his failure so to do could not be considered as any admission of guilt.

Speaking of the effect of silence in the presence of statements made by third parties, Duncan, J., in delivering the opinion of the court in *Moore v. Smith*, 14 Serg. & R. 393, said:

"Nothing can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be, unless the evidence is of direct declarations of that kind which naturally call for contradiction; some assertion made to the man with respect to his right, which, by his silence, he acquiesces in."

And it is to be noted that this language was used with regard to the effect of silence in a matter relating to a civil case.

A distinction is made between declarations made by a party interested and those made by a stranger. And it has been held that, while that which one party declares to the other without contradiction is admissible in evidence, that which is said by a third person may not be so. "It may be impertinent," says Mr. Greenleaf in his work on Evidence (Volume 1, 16th ed. § 198), "and best rebuked by silence; but, if it receives a reply, the reply is evidence. Therefore, what the magistrate before whom the assault and battery was investigated said to the parties was held inadmissible in a subsequent civil action for the

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In *Com. v. Kenney*, 12 Mete. 235, 46 Am. Dec. 672, the officer in custody of the defendant said, in his presence and hearing, "Here is a man that has been robbing a man." Shortly afterwards one Russell, the person named in the indictment as having been robbed, came in, crying, and said, "That man," pointing to the defendant, "has stolen my money." The defendant made no reply to these statements. At the trial of the case testimony was admitted, against the defendant's objection, to the facts stated. In reviewing the action of the trial court it was held, in an opinion by Shaw, C. J., that the evidence in question was inadmissible. The court said: "The declaration made by the officer who first brought the defendant to the watch-house, he had certainly no occasion to reply to. The subsequent statement, if made in the hearing of the defendant (of which we think there was evidence), was made whilst he was under arrest and in the custody of persons having official authority. They were made by an excited, complaining party, to such officers, who were just putting him into confinement. If not strictly an official complaint to officers of the law, it was a proceeding very similar to it, and he might well suppose that he had no right to say anything until regularly called upon to answer."

In *Com. v. Walker et al.*, 13 Allen, 570, the District Attorney called a police officer as a witness, who was allowed to testify, under objection, that while Carey, one of the defendants, was in a cell in the lockup, he went to the door of the cell with Mrs. Newhall, who was a witness for the prosecution, and pointed out Carey to her, and, in his presence and hearing asked her if she could identify him as the man who was with Walker, and she said, "Yes;" that he asked her if she could swear to it, and she said, "Yes." The defendant made no reply.

In sustaining the exceptions, Foster, J., in delivering the opinion of the court, said: "The testimony of the police officer to the conversation between himself and the witness, Mrs. Newhall, in the presence of the defendant, while the latter was in custody, should not have been admitted. The defendant was not bound to deny or reply to the statements made between

them, and his silence, under such circumstances, warranted no inference against him."

In *Bob v. State*, 32 Ala. 560, Walker, J., in delivering the opinion of the court, said: "The implication of admissions from silence rests upon the idea of acquiescence. The maxim is, '*Qui tacet, consentire videtur*;' and it never applies unless an acquiescence in what is said can be presumed. Neither reason nor law will permit the presumption of acquiescence to be drawn from the silence, unless the circumstances were not only such as afforded the party an opportunity to act or speak, but such, also, as would properly and naturally call for some action or reply from men similarly situated."

In *Gardner v. State* (Tex. Cr. App.) 34 S. W. 945, it was held that, where a party is under arrest, his silence cannot be used against him in a criminal case. Mr. Wharton, in his work on Criminal Evidence (9th ed.) § 680, takes the same view.

In *State v. Diskin*, 34 La. Ann. Rep. 919, 44 Am. Rep. 448, it is held that mere silence while a party is held in custody under criminal charge affords no inference whatever of acquiescence in statements of others made in his presence. "He has the undoubted right," says the court, "to keep silence as to the crime with which he is charged and is not called upon to reply to or contradict such statements. Under such circumstances it is held that the statements so made are not admissible against the prisoner, because they do not even tend to support the hypothesis of acquiescence."

To the same general effect are *State v. Young*, 99 Mo. 666, 12 S. W. 879; *State v. Howard*, 102 Mo. 142, 14 S. W. 937; *Rex v. Appleby*, 3 Starkie's Rep. 33; and *Child v. Grace*, 2 Carr. & P. Rep. 193. See, also, *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782.

Even in those cases where it is held that evidence of a defendant's silence in the presence of charges made against him is admissible, the courts unanimously hold that it must plainly appear that the statements made were fully understood by the party before any inference can be drawn against him by reason of his silence. In the case at bar, therefore, we think most of the evidence in question would have to be excluded in any event; for it not only does not plainly appear that most of the language used at the police station by Zarrinsky and others was

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understood and appreciated by the defendant, but, on the contrary, we think it is very clear that he did not understand the same, and was not in a physical condition to enable him to understand it. He had jumped or fallen from the attic window referred to, to the ground, a distance of about twenty-five feet, where he lay in a helpless condition and seriously injured, until he was taken up bodily by the policeman and placed in the patrol wagon; and at the station he was laid upon the floor in a helpless condition, and was suffering severe pain from the injuries he had sustained by the fall.

In view of all these facts, we are clearly of the opinion that it was error to admit the testimony in question, except in so far as the accusations made were expressly replied to by the defendant. We are also of the opinion that it was error to admit the statements made in the presence of the defendant immediately after his fall from said window, except as to the one to which he made some reply. Such a fall must have left him in a dazed and semi-conscious condition at the best; and it cannot be said with any show of reason that his silence while in such a condition, when charges or accusations were made against him, could be of the least weight in determining as to his guilt of the crime now charged against him.

2. Another, and what seems to us a fatal, objection to the admissibility of most of the testimony now under consideration (although this ground of objection was not taken by counsel) is that most of the statements or accusations made by Zarrinsky at the police station were made through an interpreter, and hence became mere hearsay when testified to at the trial; that is to say, the police officers interrogated Zarrinsky through an interpreter as to what took place at the attic room in question, and the responses which he made thereto were also given through the interpreter. In so far, therefore, as their testimony at the trial related to what Zarrinsky said in this way, it was clearly hearsay testimony; for they only knew what was in fact said by him from what the interpreter told them that he said. See *State v. Terline*, 23 R. I. 539, 51 Atl. 204. The same objection also applies to what little was said by the defendant in reply to the accusations there made against him. He is a Russian, and had been in this country only about six months at the time of the homicide in question.

3. Whether any of the statements made by Zarrinsky at or

about the time when the assault upon him is alleged to have been made were admissible as part of the *res gestæ*, we will now consider. Defendant's counsel contend that they were not.

Most of said statements, which were admitted as being part of the *res gestæ*, against the defendant's objection, were such as to fall within the rule as laid down by this court in *State v. Murphy*, 16 R. I. 528, 17 Atl. 998, with which rule we are content, and which we desire to reaffirm.

The statements now in question consisted of accusations which were evidently instinctively made by Zarrinsky during and immediately following the assault, and were such as to rebut all inference of calculation in making them.

We do not wish to be understood, however, as holding that what was said by Zarrinsky to the policeman and others, after he had returned to the attic room and dressed himself—it appearing that from 15 minutes to half or three-fourths of an hour had elapsed between the time of the making of the assault and the making of such statements—would be admissible under the rule as above stated; for, as already intimated, it is only such statements as are immediately connected with the transaction and really form a part of it that can properly be said to be a part of the *res gestæ*. Moreover, as we infer from the record of the testimony, the statements made by Zarrinsky in the presence of the officers and others, while defendant lay upon the ground after falling from the attic window, were made in his native language; and, if our inference is correct, for the reason above suggested, said statements could only be testified to, in any event, by such of those persons who were present and heard them as understood that language.

We have examined the numerous other exceptions taken by defendant's counsel at the trial, but do not find that any of them are tenable, or deserving of special consideration. As there must be a new trial for the reasons above given, there is no occasion for us to determine whether the verdict is against the evidence.

New trial granted.

ADMISSION

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LOW v. STATE.

108 Tenn. 127—65 S. W. Rep. 401.

Decided November 9, 1901.

ADMISSIONS THROUGH SILENCE—PRACTICE: *Erroneous admission of testimony—Amendment of record after argument.*

1. It is proper to prove, that on being accused, the defendant remained silent; but not that such accusation was made and denied.
2. Having erroneously admitted evidence, that defendant was accused and denied the accusation, the court should have instructed the jury to disregard such testimony.
3. Even after argument in the Supreme Court, it is permissible to amend the record of that court, to show that the indictment was indorsed "A True Bill."

Supreme Court of Tennessee.

Appeal from Circuit Court, Scott County; Hon. W. R. Hicks, Judge.

Riley Low, convicted of murder, appeals. Reversed.

E. E. Houk, Sam E. Young, and William E. York, for the appellant.

G. W. Pickle, Attorney General, for the State.

CALDWELL, J. Riley Low is under sentence of death for the murder of his young step-son, Louis Mullins, by poisoning.

At the trial the grandmother of the child testified that he stated to her in the presence and hearing of the defendant that he had administered the poison, and that the defendant remained silent. She also testified that when the child died his mother brought the same accusation against the defendant, and that he positively denied it.

The former of these statements by the witness was competent testimony; the latter was incompetent.

If a man be accused of an offense, and, hearing the accusation, neither admit nor deny it when he should know the truth and may speak, proof of the imputation having been made and of his silence is competent as an implied admission, or a circumstance tending to show his guilt; but, if he make positive denial, the imputation constitutes a mere unsworn charge, and

proof of it has no legal force or competency. *Kendrick v. State*, 9 Humph. 723; *Deathridge v. State*, 1 Sneed, 80.

The Court not only made the mistake of admitting the incompetent testimony mentioned, but in the charge upon the law of the case expressly submitted it to the consideration of the jury without any instruction as to its effect or the legal force of the defendant's denial.

Having been erroneously admitted in the first instance, the incompetent testimony should afterwards have been withdrawn in the charge.

We express no opinion on the facts of the case, but place our reversal entirely upon the errors indicated.

The objection that the indictment copied into the transcript does not contain the indorsement, "A True Bill," is removed by a supplemental transcript supplying that defect. This is true though the supplement has been made and filed since the argument of the case in this court.

Reversed and remanded.

COMMONWEALTH V. MORRISSEY.

175 Mass. 264—56 N. E. Rep. 285.

Decided February 27, 1900.

ADULTERY—CONFESSIONS: *Proof of guilt by the defendant's testimony in a bastardy case.*

In a prosecution for bastardy against another person, the defendant, a married man, appeared as a witness and testified, that on three occasions, he had had sexual intercourse with the prosecutrix therein. *Held*, that there being no dispute that the woman had been delivered of an illegitimate child, the natural inference is that she had had sexual intercourse with a male person, and that the confession of this defendant, as a witness, was sufficient to fix upon him the guilt of adultery.

Supreme Judicial Court of Massachusetts.

Exceptions from the Supreme Judicial Court, Berkshire County.

One Morrissey, convicted of adultery, brings exceptions. Overruled.

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C. L. Gardner, Attorney General, for the Commonwealth.

P. J. Moore, for the defendant.

HAMMOND, J. The defendant was indicted for adultery with Bridget Lee. At the trial it appeared that at the trial of a complaint for bastardy made by the said Bridget Lee, who was a single woman, and had been delivered of an illegitimate child, against one Curry, charged with being the father of the child, in which the issue was whether Curry was the father of the child, this present defendant, being duly sworn as a witness, testified that on three several occasions (one being the day named in the indictment), at Hinsdale, in the County of Berkshire, he had carnal knowledge of the body of the said Lee, and that he was on all such occasions a married man.

It is to be assumed that this evidence was there introduced to show that by reason of such sexual intercourse there might be a doubt as to whether the defendant in that suit was the father of the child, since that was the ground upon which such evidence was admissible; and this testimony could throw doubt upon that issue only upon the theory that the conception of the child might have occurred as the result of such intercourse. As to these facts there does not seem to have been any dispute.

Since the woman was delivered of a child, the natural inference is that she had had sexual intercourse with a man; and as she had never been married, there was evidence that a crime had been committed—fornication or adultery, according as the man was single or married at the time. The evidence lacking was simply as to the identity of the man, and that evidence was furnished by the confession of the defendant. Under these circumstances, the question whether it was competent to convict upon an uncorroborated confession was an abstract one, not raised upon the evidence, and on which the court was not required to express an opinion. The undisputed facts were sufficient corroboration, if any was needed. *Commonwealth v. Tarr*, 4 Allen, 315; *Com. v. McCann*, 97 Mass. 580. Exceptions overruled.

STATE V. SNOVER.

65 N. J. L. 239—47 Atl. Rep. 583.

Decided November 19, 1900.

ADULTERY: *Testimony of other prior acts between the same parties, even in another jurisdiction, admissible.*

1. In prosecutions for adultery, evidence of prior offenses of like character between the same parties is admissible after or in connection with evidence of the particular carnal act shown. Such evidence is admissible although it may show that the accused was guilty of an extraneous offense.
2. The evidence so adduced being merely corroborative of the offense charged, the fact that the prior offense was committed in another county will not be a bar to its admission.
3. The competency of this evidence, the admission of which arises under an exception to the general rule excluding the proof of extraneous offenses, arises from the fact that it proves the relations and mutual disposition of the parties.

(Syllabus by the Court.)

Court of Errors and Appeals of New Jersey.

Error to the Supreme Court.

Thomas L. Snover, convicted of adultery, brings error. Affirmed.

William H. Morrow, for the plaintiff in error.

George A. Angle, Prosecutor of the Pleas, for the State.

HENDRICKSON, J. The plaintiff in error was convicted of the crime of adultery in the Warren Quarter Sessions. Upon writ of error the Supreme Court affirmed the judgment. The case is here for further review.

The only exception that has been argued and that need be noticed is one taken to the ruling of the trial judge in the admission of certain evidence tending to show a previous act of adultery between the parties to the offense charged. The facts sufficiently appear in the opinion of the Supreme Court, found in 35 Vroom 65; 44 Atl. 850.

The evidence objected to is that of a witness who, among other things, testified that in the spring of 1897 he attended the moving of one Brink, who moved from the County of Warren

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to the County of Sussex; that the defendant and H. W. were at said moving; that he (witness) stayed at said Brink's, in Sussex County, all night; that the defendant and the said H. W. also stayed at Brink's house that night; and that the defendant and the said H. W. occupied the same room that night at Brink's.

The record shows that the adulterous act for which the defendant stands convicted by him with the said H. W., a married woman, in said County of Warren, on October 1, 1897.

The evidence was objected to on the ground that it tended to show a separate and distinct offense, committed in another county, not embraced in the indictment.

The Supreme Court sustained the action of the trial judge in admitting the evidence objected to, on two grounds.

The first ground is stated in the opinion in this wise: "As stated in the bill of exceptions (which is all we have), the fact is not inculpatory. The room was without privacy. It is not even described as a bedroom or sleeping apartment. Others who stayed all night after the moving may have used it. A bad construction will not be supplied."

It is contended on behalf of the plaintiff in error that this view of the Supreme Court is erroneous.

I find myself unable to concur in this mode of disposing of the exception.

It must be observed that this evidence stands upon the record unexplained by the defendant or any other witness; and, standing thus, I cannot say that the circumstances thus established had no tendency to prove improper relations between these parties. And since the evidence has such a tendency in such a degree, at least, the weight and sufficiency of it are for the jury to determine. 1 Greenl. Ev. 49. Evidence of this character cannot be overruled or excluded on the ground that it fails to establish satisfactorily the adulterous act.

It was so held in the case of *People v. Dimick*, 107 N. Y. 13, 14 N. E. 178, where, upon a charge of false pretenses, the learned judge who delivered the opinion sustaining the admission of the evidence of other like offenses in proof of the intent, remarked that the proof as to the other crimes may have been inconclusive, but the People had the right to give it, and have it submitted to the jury, with proper instructions, for their consideration.

But the Supreme Court has sustained the ruling complained

of upon the further ground that the evidence of other like acts between the parties is admissible to prove the disposition of the parties towards each other; that such evidence is an exception to the general rule excluding the proof of collateral crimes against a defendant in a criminal prosecution.

We are asked to reverse this ruling also, and it is contended by counsel for the prisoner that the cases in this State which he cites are opposed to this proposition. It is undoubtedly the general rule, as stated by Chief Justice Depue, in speaking for this court in the late case of *Bullock v. State*, 47 Atl. 62, that on the trial of an accused for a crime, it is not competent to prove that he committed other crimes of a like nature, for the purpose of showing that the accused would be likely to commit the crime charged in the indictment; citing the New Jersey cases. 47 Atl. Rep. 62. While not denying the existence of exceptions to the general rule, as suggested in the opinion, counsel insists that the evidence objected to does not come within such exception.

Among the exceptions to this general rule, there is one that seems to be well recognized, as applying to the trial of offenses involving illicit intercourse between the sexes. The principle is that, in prosecutions for adultery, evidence of prior acts of improper familiarity or adultery between the same parties is admissible after or in connection with evidence of the particular carnal act shown. The competency of this evidence arises from the fact that it proves the relations and mutual disposition of the parties. 1 Am. & Eng. Enc. Law, p. 214; 2 Whart. Cr. Law (9th ed.) 1733; Whart. Cr. Ev. (9th ed.) 35; 1 Am. Dig. (Cent. ed.) p. 2013, § 30.

In *Com. v. Thrasher*, 11 Gray, 450, there was a distinction made between improper familiarity and the substantive act of adultery; prior acts of the former character being held admissible, but of the latter inadmissible. This doctrine was distinctly overruled by the Supreme Court of the same State in the later cases of *Thayer v. Thayer*, 161 Mass. 111, and *Com. v. Nichols*, 114 Mass. 285.

Mr. Justice Van Syckel, in the recent case of *State v. Jackson*, 65 N. J. L. 62; 46 Atl. 767, speaking for the Supreme Court of the State, fully affirms the doctrine I have just stated, and says that the later cases, which he cites, almost uniformly declare such evidence to be admissible.

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It is urged that the rule of evidence thus avowed is at variance with the decisions in this State, and is not embraced within the exceptions summarized in *State v. Raymond*, 53 N. J. Law, 264, 21 Atl. 328. But nevertheless it seems clearly to be within the principle enunciated in that case by Mr. Justice Dixon in delivering the opinion of the Supreme Court, where he says, "And, in general, it may be said that, whenever the defendant's guilt of an extraneous crime tends logically to prove against him some particular element of the crime for which he is being tried, such guilt may be shown." Again, he says, "There must appear, between the extraneous crime offered in evidence and the crime of which the defendant is accused, some other real connection, beyond the allegation that they have both sprung from the same vicious disposition." This, I think, is a correct statement of the principle involved; and, applying it to the case under consideration, the evidence objected to contains the very criteria of the test suggested. If evidence had been offered to show that the defendant had committed adultery with a person other than the one referred to in the charge, it would have been clearly outside of this rule and inadmissible. But the offer is to prove a prior act of adultery between the same parties, thus evolving a circumstance the logical effect of which would be, in connection with other circumstances, to throw light upon the offense charged, by showing the presence in the parties of the adulterous disposition towards each other. Upon a kindred principle, the admission of evidence pertaining to extraneous offenses, where they furnish relevant circumstances in proof of the crime charged, was sustained in this court in *Mayer v. State*, 35 Vroom 323; 45 Atl. 624.

There is no force in the contention that the evidence should be excluded because it related to an occurrence over the line in the adjoining county of Sussex. The defendant was not on trial for what occurred there, and hence the question of jurisdiction could not arise with regard to it. The ruling upon this point is sustained in the following cases: *Com. v. Nichols*, 114 Mass. 285; *State v. Guest*, 100 N. C. 410, 6 S. E. 253; *Funderburg v. State*, 23 Tex. App. 392, 5 S. W. 244. Upon these grounds, my conclusion is that the judgment of the Supreme Court should be affirmed.

For affirmance—The Chief Justice, Dixon, Collins, Fort, Bogert, Hendrickson, Adams, Vredenburg, Voorhees. 9.

For reversal—None.

SWEENIE V. STATE.

59 Neb. 269—80 N. W. Rep. 815.

Decided November 9, 1899.

ADULTERY—PRACTICE: *Indorsing additional name on the information—Habitual living together—Single act—Presumptions—Conflicting instructions—Statute not uncertain.*

1. After the trial of a criminal action has commenced, it is error for the court to permit the name of a witness for the State to be indorsed on the information.
2. The mischievous effect of giving an erroneous instruction to the jury is not cured by giving another which correctly states the principle of law involved.
3. No presumption of law, either conclusive or rebuttable, arises from the fact that an unmarried man and a married woman had sexual intercourse on one occasion while dwelling together in the acknowledged relation of master and servant.
4. A jury might be authorized, in a proper case, to presume the existence of an adulterous relationship from sporadic acts of sexual commerce.
5. By section 208 of the Criminal Code it is unlawful for persons not joined together in wedlock to live in a state of adultery, either secretly or openly, whether they profess to live in the marital state or not.

(Syllabus by the Court.)

6. An instruction that a single act does not constitute adultery, does not cure an erroneous instruction that as to presumptions arising from a single act with continued favorable conditions. The former relates to a matter of substantive law; but the latter to rules of evidence. (J. F. G.)

Supreme Court of Nebraska.

Error to the District Court of Butler County; Hon. Bates, Judge.

William J. Sweeney, convicted of adultery, brings error. Reversed.

Hastings & Hall, and *C. H. Aldrich*, for the plaintiff in error.

Constantine J. Smyth, Attorney General, and *Willis D. Oldham*, Deputy Attorney General, for the State.

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SULLIVAN, J. William J. Sweeney was convicted and sentenced under that provision of section 208 of the Criminal Code which makes it unlawful for any unmarried man to "live and cohabit with a married woman in a state of adultery." One of the assignments of error is based on the fact that the court, during the progress of the trial, permitted the Prosecuting Attorney to indorse on the information the name of Louis Straka, who, being afterwards called as a witness, gave material testimony on behalf of the State. The statute makes it the duty of the Public Prosecutor to indorse on the information, at the time of filing the same, the names of the witnesses by whom he expects to prove the crime charged; and it is further declared that "at such time before trial of any case as the court may, by rule or otherwise prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him." By the evident import of the language quoted, the authority to indorse the names of witnesses on the information does not extend beyond the commencement of the trial. "There is no hardship in this rule," says Maxwell, C. J., in *Stevens v. State*, 19 Neb. 647, 28 N. W. 304, "and it is clearly in furtherance of a fair trial, and, being a provision of the statute, it cannot be disregarded." Other cases affirming this view are *Gandy v. State*, 24 Neb. 716, 40 N. W. 302; *Miller v. State*, 29 Neb. 437, 45 N. W. 451; *Parks v. State*, 20 Neb. 515, 31 N. W. 5; *Rauschkolb v. State*, 46 Neb. 658, 65 N. W. 776; *Fager v. State*, 49 Neb. 439, 68 N. W. 611. The reception of Straka's testimony over defendant's objection was, therefore, reversible error.

It is conceded that Anna Lissa, with whom it is claimed the alleged crime was committed, lived as a servant in defendant's home during the period in question. This fact, together with the dissolute character of the woman, and the testimony of her discarded paramour, tending to show the commission of a single adulterous act, constituted the salient features of the State's case. Both Sweeney and Mrs. Lissa denied positively that there ever existed any criminal intimacy between them. They also disclosed circumstances indicating the existence of deterrent conditions and the lack of adequate opportunities. The court instructed the jury as follows (instruction No. 6): "That if the jury find from the evidence, beyond a reasonable doubt, that the defendant and Anna Lissa had sexual intercourse during

any portion of the time alleged in the information, then the rule of law is that it is presumed that the defendant and said Anna Lissa had sexual intercourse habitually as long thereafter as she was an inmate of defendant's dwelling house." It being conceded that the parties lived in the same house, the practical effect of the instruction was to advise the jury to convict if a single act of adultery was proven beyond a reasonable doubt. This was error requiring a reversal of the judgment, notwithstanding the fact that in other paragraphs of the charge given at the defendant's request it was stated that habitual intercourse is an essential element in the crime of illicit cohabitation. The paragraph complained of stated a rule of evidence, while those given at defendant's instance related to matters of substantive law. The latter had no tendency to cure the error in the former. Besides, it is well settled that they could not have had that effect, even if they covered the same ground. *Ballard v. State*, 19 Neb. 609, 28 N. W. 271; *Barr v. State*, 45 Neb. 458, 63 N. W. 856; *Metz v. State*, 46 Neb. 547, 65 N. W. 190. Since the Attorney General does not attempt to vindicate the action of the court in giving the instruction quoted, but contends merely that it was harmless, when considered in connection with the instructions given at defendant's request, we pass the point without discussion. It may be well enough, however, to remark that a jury would be authorized, in a proper case, to presume the existence of an adulterous relationship, within the meaning of the statute, from sporadic acts of sexual commerce. In what we decide in this behalf—and all we decide—is that no presumption of law, either conclusive or rebuttable, would arise from the fact that the defendant and Anna Lissa had sexual intercourse on one occasion while they were dwelling together in the acknowledged relation of master and servant.

It is contended by defendant that the statute does not cover cases like the one at bar. We think it does. We think the Legislature intended by sections 208 and 209 of the Criminal Code to make it unlawful for persons not joined together in wedlock to live in a state of adultery or fornication, either secretly or openly, and whether they profess to live in the marital state or not. If they cohabit—if they live after the fashion of husband and wife—they are within the letter of the statute, and likewise, it seems to us, within its spirit. Such seems to be the view taken in *State v. Way*, 5 Neb. 283, where it is said by Gantt,

J., in the sense in which the word is used together also, *Clayton v. Luster v. State*, 15 Neb. 15.

It is further contended that the instruction is erroneous in which the jury is directed to find the defendant guilty since the instruction is not a statement of the law. The contention is that the instruction is not a statement of the law, but a statement of the facts, and the court is not to be reversed.

Reversed.

CHIEF OF COURT.

1. Refused to admit evidence except where the evidence was verified by the testimony of the Attorney General, when the evidence was verified by the testimony of the Attorney General.
2. When the evidence was verified by the testimony of the Attorney General, the evidence was verified by the testimony of the Attorney General.

Supreme Court.
Original Jurisdiction.

Benjamin J. Gantt,
Attorney General.

Ricks.

J., in the course of the opinion: "To cohabit, according to the sense in which the word is used in the statute, means dwelling together as husband and wife, or in sexual intercourse." See also, Clark, Cr. Law, p. 318; *Carotti v. State*, 42 Miss. 334; *Luster v. State*, 23 Fla. 339, 2 South. 690; *Com. v. Lindsey*, 10 Mass. 153; *Wright v. Stuart*, 5 Blackf. 121 (Ind.).

It is further contended that the provision of the statute under which the prosecution was instituted is void for uncertainty, since there is no legislative definition of "a state of adultery." The contention is obviously without merit, and is only mentioned here to avoid the inference that it may have been entirely overlooked. The judgment of the District Court is reversed, and the cause remanded.

Reversed and remanded.

PEOPLE ex rel. HALL v. HOLDOM, Judge.

193 Ill. 319—61 N. E. Rep. 1014.

Opinion Filed December 18, 1901.

BILL OF EXCEPTIONS: *Mandamus to require a judge to certify and seal.*

1. Refusal of a presiding judge in a criminal case to sign a bill of exceptions is not justified by the facts that the bill is not verified or sworn to by any person or approved by the State's Attorney, nor that he did not know personally or remember whether the matters set forth in the bill were correct or not.
2. When the bill of exceptions is presented to the judge it is his duty to examine it and point out where the inaccuracies are and what corrections shall be made, and when the bill, in his judgment, truly sets forth the proceedings and the evidence, it is his duty to sign and seal the same.

Supreme Court of Illinois.

Original petition for *mandamus*. Writ awarded.

Benjamin Staunton, for the petitioner.

H. J. Hamlin, Attorney General, *Charles S. Deneen*, State's Attorney, and *F. L. Barnett*, for the respondent.

RICKS, J. This is a petition for a writ of *mandamus* to com-

pel Jesse Holdom, one of the judges of the Superior Court of Cook County, to sign and seal a certificate of evidence or bill of exceptions in a certain criminal case in which the petitioner was a defendant, and who had been tried before said judge. The matter comes before us for hearing on petition, answer, and replication.

It appears that during the month of February, 1901, the petitioner was tried before the respondent, sitting in the Criminal Court of Cook County, on the charge of robbery, and was convicted. He prayed and desired to take the case up on error, and sixty days' time was given him in which to prepare and file his bill of exceptions. On the 25th or 26th day of February petitioner presented to the respondent what purported to be a bill of exceptions, and requested him to certify and seal the same. Respondent inquired if said bill had been exhibited to the State's Attorney and approved by him. Petitioner's counsel replied that it had not, whereupon the respondent directed counsel for petitioner to submit such bill of exceptions to the State's Attorney for his approval, and stated that, if he did not object to the same, he (respondent) would sign and seal it. Petitioner's counsel informed the court that he was not aware the law required the approval of the State's Attorney to a bill of exceptions, whereupon the court declined to examine or pass upon such bill until the same was O. K.'d or approved by the State's Attorney. Counsel for petitioner presented the bill of exceptions to the State's Attorney, who declined to examine or approve it.

Respondent, in explanation of his declination to act upon or sign the bill of exceptions, states that the same was not verified or sworn to by any person; that there was no official reporter; and that he did not know personally, or remember, whether the matters set forth in the bill were correctly set forth. It appears however, that all this testimony, except that of the prosecuting witness, Frank Otto, was transcribed as it was given. It further appears that the testimony of this prosecuting witness was taken by a stenographer whose whereabouts was unknown to the petitioner or his counsel. This peculiar condition of things seems to have arisen from the fact that petitioner, who is not a lawyer, conducted his own defense. It appears that petitioner had engaged the services of William A. Cunnea, a practicing lawyer of Cook County, to defend him, and that a day or two

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before the trial of petitioner was called, his said attorney became engaged in the trial of a cause in one of the branches of the Supreme Court of that county before Judge Waterman. Petitioner was in jail. His attorney, so employed, advised the court of his engagement the day before petitioner's trial was to be called; that he was so engaged, and was likely to be for a number of days, in the case then in progress, and requested that said sitting be canceled or the cause be continued to a future day, and made like communication to and request of the State's Attorney. Upon the day of the trial, petitioner's counsel not appearing, petitioner asked the court to continue the cause or delay it until the attendance of his counsel could be had. This the court declined to do, and appointed one L. L. Elliot, an attorney of said court, to defend petitioner. Petitioner declined to accept the services of said attorney, and insisted upon the presence of the attorney employed by him; but the court proceeded with the trial, and the petitioner represented himself, examining the witnesses and doing whatever was done in the way of his defense. When the bill of exceptions was presented to respondent, he was advised by petitioner's counsel that he was unable to produce the stenographic report of the prosecuting witness, but that he had made a statement of the evidence with the assistance of a bystander who had heard it, and that it was presented in and with the bill of exceptions.

The petitioner was convicted of a grave offense, and was entitled to the benefit of a record and a bill of exceptions, and to have his case passed upon by a court of appeals. This he could not have without the certificate and approval of respondent. We do not regard the reason assigned by respondent for his failure or refusal to make up or cause to be made up a properly certified bill of exceptions as sufficient. No authority for requiring a verification by the oath of anybody as a condition precedent upon which it is to be signed and approved by the trial court has been pointed out, and we cannot give our approval to such practice. Such a bill, when presented, contains so many things that no person except an expert stenographer would be willing to swear to its accuracy. Under our practice it contains motions, and sometimes the rulings on them, exceptions to evidence, copies to exhibits and affidavits, and numerous matters that seem to make it inexpedient to have attached to its approval by the court such a condition as is here sought to be

imposed. We have no doubt that, if respondent had called before him the State's Attorney and petitioner and his counsel, a bill could have been agreed upon. The stenographer, who took all the evidence except that of the prosecuting witness, could have been brought before the court, and inquired of as to the accuracy of his report; and, if the stenographer who took the testimony of the prosecuting witness could not be found, the court was authorized to call the witness before him, or make such other investigation and inquiry as would enable him to comply with his duty, and give the petitioner such a bill of exceptions as would enable him to prosecute his writ of error. In *People v. McConnell*, 155 Ill. 192 (40 N. E. 608), we held that, where the court who had tried the case had died, his successor in office could be required to sign and approve a bill of exceptions, and in that case Mr. Justice Phillips, in speaking for the court, said (page 202): "We have repeatedly held, and the citation of cases is unnecessary, that in settling a bill of exceptions by the trial judge he may resort to every legitimate means of ascertaining the correctness of the bill he is called upon to authenticate. He may not only have recourse to the stenographic report, but may send for the witnesses, and take such other steps and measures as will legitimately and properly advise him of the truth and of the correctness of the bill of exceptions which he signs." And to the same effect is *People v. Higbee*, 172 Ill. 251 (50 N. E. 110). This respondent tried the case, and will doubtless, upon inspecting the record and reading the evidence tendered him, be able to sufficiently recall it to direct the proper preparation of the bill. *People v. Williams*, 91 Ill. 87.

The respondent does not place his failure to act or approve the bill presented to him upon the ground that it was not right, or that it contained incorrect statements of the evidence or exceptions, or any other matter that was improper to be there. In fact, he does not claim to have examined it, or to have so advised himself as to be able to say that it contained any objectionable or inaccurate matter. We do not desire to be understood as requiring respondent to approve the particular bill of exceptions presented to him in the exact condition as presented; but it was and is his duty to examine it, and to point out where the inaccuracies are, and what corrections should be made; and when the bill, in his judgment, truly sets forth the proceedings

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People v. Williams, supra.

Peremptory writ of *mandamus* is granted.
Writ awarded.

STATE V. KENTNER.

178 Mo. 487—77 S. W. Rep. 523.

Decided December 9, 1903.

BUCKET-SHOP: *Information and evidence held sufficient.*

1. KEEPING PLACE FOR SELLING OPTIONS: INFORMATION—An information charging one with keeping a place where stock and grain are bought and sold on margin, is sufficient if in the language of the statute.
2. ———: ———: INTENT—It is not necessary in such case that the intent of the defendant be alleged in the information.
3. ———: LOCATION—The evidence showed that the defendant, who lived in a city, had his office there connected by wire with one in the county where he was prosecuted, and there he had an agent, whom he paid a salary, and to whom he telephoned daily the prices of stocks, bonds, and grains, and persons would come into this place and employ the agent to buy for them, "margins" on the strength of such reports, and deposit with him the money for that purpose. There was no intention by the seller to deliver the article pretended to be purchased, nor did the buyer expect that. The money was put up on all the deals of this kind, and the money deposited in that town to the credit of defendant. If the market value of the article went down, the purchaser lost his margin. *Held*, that the pretended purchases were made at the defendant's place of business in the county in which he was prosecuted, and not in the city where defendant had his other office. *Held*, also, that these facts bring the case clearly within the provisions of the statute which denounces the keeping of places of business in this State wherein is conducted or permitted the pretended buying or selling of certain articles named therein, either in margins or otherwise, without any intention of receiving and paying for the property.

Supreme Court of Missouri; Division No. 2.

Appeal from Circuit Court, Holt County; Hon. Gallatin Craig, Judge.

O. A. Kentner, convicted of keeping a bucket shop, appeals. Affirmed.

See 74 S. W. 9.

Crandall & Strop and *John Kennish*, for the appellant.
Ivan Blair, Prosecuting Attorney, for the State.

BURGESS, J. On the 11th day of April, 1902, the Prosecuting Attorney of Holt County filed with the clerk of the Circuit Court of said county an information against the defendant, Kentner, which is as follows:

"Ivan Blair, Prosecuting Attorney in and for the County of Holt and State of Missouri, upon his oath of office informs that the defendant, O. A. Kentner, on or about the 1st day of May, 1901, and on divers other days before and since said 1st day of May, at and in the County of Holt and State of Missouri, did then and there unlawfully keep and caused to be kept a certain office room and place, wherein he, the said O. A. Kentner, conducted, and then and there permitted Steven T. Lucas, William S. Cannon, John Jourdan, John Trice, C. O. McIntyre, and divers other persons unknown, to engage in the pretended buying and selling of the shares of stock and bonds of certain corporations, the names of which, where organized, and by virtue of what laws, are unknown, and cannot be given, and certain quantities of petroleum, and provisions, to-wit, pork and lard, cotton, grain and agricultural products, to-wit, wheat, corn, and oats, on margins, so-called, the said persons so pretending to sell the said commodities, and pretending to offer the same for sale, not intending then and there to have the full amount of said property so sold or offered to be sold, or any part thereof, on hand or under their control, to deliver upon such sale, and the said parties so to buy said commodities, and pretending to offer to buy the same, not intending then and there to actually receive the same if purchased, or to deliver the same if sold; against the peace and dignity of the State."

Thereafter, at the April term, 1902, defendant filed a motion to quash said information, which is as follows:

"First. Comes now defendant, and prays the court to quash the information in this case, for the reason that the information filed does not state facts sufficient to charge the defendant with a crime under the laws of the State of Missouri.

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"Second. Because the act of the Legislature and laws upon which this prosecution is based is unconstitutional and void, for the reason that it gives to the informer or Prosecuting Attorney one-fourth of the amount of fine imposed for this violation, and for that reason is in conflict with that provision of the Constitution of the State of Missouri which grants exclusive power to the Governor of the State to grant pardon and remit offense, etc.

"Third. Because said information is indefinite and uncertain that it does not inform the defendant of what offense he has to be tried, nor allege that he intended to commit any offense."

This motion was overruled, and defendant saved exceptions.

The defendant was then put upon his trial, found guilty, and his punishment fixed at a fine of five hundred dollars. He appeals.

The facts, briefly stated, are that the place for keeping which defendant was convicted was in the town of Mound City, in Holt County. It was not contended that such place was kept or conducted by the defendant in person; nor that he was ever in Holt County, or made any agreement therein, in connection with the keeping of such place. As shown by the evidence, defendant was a resident of St. Joseph, Buchanan County, Missouri, and was engaged in business in said city of St. Joseph. The theory of the prosecution is that the defendant was keeping the office or place charged in the information through his agent, one W. Eben Smith, who was in the actual charge of such office or place. A written agreement offered in evidence by the State, was entered into by defendant and said Smith at St. Joseph, Buchanan County, Missouri, setting forth the terms and the purpose for which Smith was employed by the defendant. According to this agreement and the evidence for the State, the defendant employed witness Smith, paying him seventy dollars per month, and furnished him the markets by telephone, free, at said Mound City. And Smith agreed to send, and did send, orders for the purchase or sale of stocks, grain, etc., to the defendant, at St. Joseph, and collected margins thereon at the time such orders were sent; such margins were deposited to the credit of the defendant in a bank at Mound City, after which Smith had no control over or interest in them. In carrying on the business at Mound City, Smith

rented a room, and paid the rent therefor, owned all the furniture therein, and had a broker's license and a city license from said city to transact such business in his own name, both of which were paid for by defendant. The manner in which the business was conducted at Mound City was as follows: There was a telephone in the office, over which Smith received from defendant, at St. Joseph, the market reports. These reports were placed upon a black-board. Those desiring to buy or sell any commodity on which the market was given would direct Smith to telephone an order to buy or sell, as the case might be, at St. Joseph, Missouri. The names of the parties dealing were not telephoned by Smith, but each order was accompanied with a certain number. Sometimes the order would be accepted at St. Joseph, sometimes not. Whatever sales or purchases, or pretended sales or purchases, were made, were made and directed to be made, in St. Joseph, Buchanan County, and not in Mound City, Holt County.

The business seems to have been conducted in the name of defendant, at which time he was also conducting the same kind of business in the city of St. Joseph, the two places being connected by wire, for the use of which he paid. Smith testified that he conducted the business at Mound City under the daily directions of the defendant, and that he was in conversation with him over the telephone many times daily.

The defendant also employed one Cannon to solicit business for the establishment in Mound City, paying him twenty-five dollars per month for his services. The evidence clearly showed that the business was carried on in violation of the statute.

The defendant insists that the court erred in overruling his motion to quash the information. The argument is that it is insufficient for the reason that it fails to charge the unlawful intent of the parties therein alleged to have been dealing on margins; that the part of the information in which such unlawful intention is attempted to be charged fails to make any averment whatever or statement of any fact.

The statute upon which this prosecution is predicated (sec. 2339, R. S. 1899) provides that it shall be unlawful for any person to keep a place wherein is conducted the buying or selling of stocks, grain, or other products, either on margins or otherwise, without any intention of receiving and paying for

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the property so bought, or of delivering the property so sold; or wherein is conducted or permitted the buying or selling of such property on margins when the party selling or offering to sell does not have the full amount of property on hand to deliver upon such sale, or when the party buying or offering to buy does not intend actually to receive the same if purchased, or to deliver the same if sold.

The information is in the language of the statute, which is sufficient in all statutory offenses where all the facts which constitute the offense are set forth in the statute. [*State v. Davis*, 70 Mo. 467; *State v. Krueger*, 134 Mo. 262, 35 S. W. 604.] The offense charged is the keeping and causing to be kept a place wherein he, the defendant, conducted and permitted certain persons named to engage in the pretended buying and selling of shares of stock and bonds, and certain agricultural products, not intending to receive the same if purchased, or to deliver the same if sold, and is not only in the language of the statute, but sets forth the names of certain persons who engaged therein in the pretended buying and selling of the shares of stock and bonds of certain corporations.

"On the general principles of common-law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute in all cases when the statute so far individuates the offense that the offender has proper notice, from the mere adoption of statutory terms, what the offense he is to be tried for really is. But in no other case is it sufficient to follow the words of the statute. It is no more allowable, under a statutory charge, to put the defendant on trial without specification of the offense, than it would be under a common-law charge." [Wharton, Cr. Pl. and Prac. (9 Ed.), sec 220.]

It was not necessary that the intent of the defendant be alleged in the information, as that is not an ingredient of the offense.

He was clearly informed by the information of the nature and character of the offense alleged against him, and could successfully plead his acquittal or conviction in bar to another prosecution for the same offense. The business was all transacted at Mound City, in Holt County. None of the articles pretended to be sold were intended to be delivered; hence there was nothing further to be done than was done to complete the transactions.

At the close of the State's case, defendant asked an instruction in the nature of a demurrer to the evidence, which was refused, and he excepted. The action of the court in this regard is assigned for error, defendant insisting that the evidence showed the sales and purchases were made in St. Joseph, Buchanan County, and not in Mound City, Holt County. The manner in which the business was conducted was for a person who desired to buy any of the articles mentioned in the information to go into the defendant's place of business in Mound City, and employ Smith as his agent to buy for him some article, at the same time depositing with him a certain amount of money with which to make the purchase, or, rather, the "margin," as there was no intention by the seller to deliver the article pretended to be purchased, nor did the buyer expect it. Nor were they ever delivered. "If the market value of the article went down, the purchaser lost his margin."

Smith received the market from Kentner over the telephone, and, when received, he would call it, and, if it was corn, the buyer would ask what corn was worth. Smith would then inquire of Kentner, who would tell him, and then he would inform the buyer. Then the latter would say, "Buy 10,000 bushels," or 1,000, or any amount he wanted, and Smith would tell Kentner to buy whatever amount he said. Margins were put up on all deals, and, when the money was paid, it was deposited in the Mound City Bank to the credit of Kentner.

It would therefore seem that the pretended purchases were made at defendant's place of business in Mound City. There is no question of delivery in this case, and the facts disclosed by the record bring it clearly within the provisions of the statute which denounces the keeping of offices and places of business in this State wherein is conducted or permitted the pretended buying or selling of certain articles named therein, either on margins or otherwise, without any intention of receiving and paying for the property. If the property was to be delivered, the transactions would not, of course, come under the ban of the statute.

The defendant was a party to the opening up the room or place of business, and knew the object and purpose. Indeed, he hired Smith, at a stipulated salary per month, to conduct the business for him, and directed by telephone all of its transactions, and received all moneys paid to Smith, as his agent,

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The constitutional question raised in the trial court is without merit, and in fact is not insisted upon in this court.

Finding no reversible error in the record, the judgment is affirmed.

All concur.

PEOPLE v. ELLIOTT.

163 N. Y. 11—57 N. E. Rep. 104.

Decided May 1, 1900.

CHARACTER: *Evidence of good character alone may be sufficient for an acquittal, against evidence otherwise conclusive of guilt—Improper cross-examination—Instructions.*

1. "It is the duty of a court of last resort to see to it, that a person charged with crime is accorded an impartial trial, and the enjoyment of every legal right."
2. The accused, who was charged with rape upon his thirteen-year-old daughter, had twelve years previously been separated from his wife by a limited divorce, granted at her instance on account of cruelty, etc.; but for about ten years they had re-united, resided together as husband and wife. The accused introduced witnesses to prove him to have been, previous to the alleged crime, of good character, and, the court permitted these witnesses to be cross-examined as to what would be their opinions if they knew that the Supreme Court had granted a divorce against him on account of cruelty—in the cross-questions, reciting the specific matters of the divorce. *Held*, error; and also, that the error was not cured by the action of the court in subsequently not permitting the divorce to be admitted in evidence.
3. It would have been proper on cross-examination to have asked

the character-witness whether they knew of the divorce; and, also proper for the accused to have shown that he and his wife had resumed marital relations.

4. The accused had the right to have the jury instructed, that good character may create a reasonable doubt as to whether such person would commit the crime charged, where otherwise no doubt existed, and that proof of good character may lead the jury to disbelieve the testimony against the accused, no matter how conclusive such testimony may seem to be.

New York Court of Appeals.

Appeal from Supreme Court, Appellate Division, Third
Judicial Department.

Frank P. Elliott was convicted of rape and appealed to the Supreme Court, where the conviction was affirmed, 60 N. Y. S. 1145, from which affirmance he appealed to the Court of Appeals. Reversed.

John P. Wheeler, for appellant.

W. B. Matterson, for respondent.

BARTLETT, J. The defendant stands convicted of the crime of rape in the second degree, committed upon the person of his daughter, 13 years old.

The Appellate Division unanimously affirmed the judgment of the trial court, and we are consequently confined to the consideration of alleged legal errors duly raised by exceptions relating to the reception or rejection of evidence and the charge of the trial judge.

It is the duty of a court of last resort to see to it that a person charged with crime is accorded an impartial trial, and the enjoyment of every legal right. In a case like the one before us, where the indictment charges a heinous and unnatural offense, it is most difficult to secure an absolutely fair trial.

The learned Appellate Division wrote no opinion. We have examined the record with care, and find that it discloses reversible error.

In the course of the trial it appeared, in a general way, that some twelve years prior to this indictment, the defendant's wife sued for a limited divorce on the ground of cruel and inhuman treatment; that the defendant, under advice of counsel, interposed no defense, and judgment was entered against

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him; that for about ten years before the present charge the defendant and his wife lived together again in the marital relation. At the close of all the evidence the District Attorney offered the judgment roll in the divorce suit in evidence, but the trial judge excluded it.

The defendant produced a number of witnesses who testified to his good character. The District Attorney, in cross-examining two of these witnesses, was allowed, over the defendant's objection and exception, to ask this question: "If it should develop that a judgment of the Supreme Court of this State had granted a divorce on the ground of cruel and inhuman treatment, and in that judgment it stated 'that at the house of Reuben Bixby, in the village of Green, and at other places in the village of Green, the defendant struck, kicked, choked, injured, and had frequently threatened to kill the plaintiff and said child, Grace B. Elliott, and the treatment and conduct of the defendant to and towards the plaintiff during said time has been cruel and inhuman, and such that it is improper and unsafe for the plaintiff and defendant longer to live together as husband and wife'— If that was attested as a fact in the Supreme Court, what would you say as to this man's character being good or bad?"

This clearly incompetent question was highly prejudicial to the defendant; placing, as it did, before the jury that particular portion of the former judgment upon which the prosecution laid stress. At this stage of the trial the judgment had not been offered in evidence, and there was nothing before the court to show that the document quoted from was in fact the duly-authenticated record of the Supreme Court. The subsequent refusal of the trial judge to admit the judgment in evidence did not cure this error, as the question was allowed to stand, and its effect upon the minds of the jury remained unbroken. It was competent for the District Attorney to ask the witnesses, who had testified to defendant's good character, whether they had heard of the divorce proceeding, and if so, whether it qualified to any extent their previously expressed opinion as to defendant's good character.

It would also be proper for defendant to show, in reply to this cross-examination, that since the judgment he and his wife had voluntarily resumed marital relations.

The second legal error is found in the refusal of the trial

judge to charge as to the weight the jury might, in their discretion, give to the evidence of defendant's previous good character.

In the main charge the trial judge said: "It is true that good character weighs for something, and it should weigh when a man is charged with crime. I leave it to you to say to what extent the evidence convinces you with reference to the good character of the defendant, and what weight that character, as it is established, should have upon your consideration of this case."

This language is exceedingly general, and is well enough so far as it goes, but falls short of clearly stating to the jury the weight they could, in their discretion, give to evidence of good character.

At the close of the charge the defendant's counsel requested the court to charge as follows: "I ask the court to charge the jury that the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbability of a person of such character being guilty, that the other evidence is false."

The court declined to so charge, except as charged, and the defendant duly excepted.

This refusal was obvious error, as defendant was entitled to have the jury distinctly instructed that good character will sometimes, of itself, create a doubt, when without it none would exist. *Cancemi v. People*, 16 N. Y. 501; *Stephens v. People*, 4 Parker, 396; *Com. v. Webster*, 5 Cush. 295; *Remsen v. People*, 43 N. Y. 9.

The court had been previously requested by defendant's counsel to charge as follows: "I ask the court to charge the jury that the jury may, in the exercise of sound judgment, give the person the benefit of previous good character, no matter how conclusive the other testimony may appear to be."

The court in response charged: "I leave it to the jury to say what weight good character should have in determining the question of the defendant's guilt or innocence. I think it is a proper subject for their consideration."

Exception was taken to the refusal to charge as requested.

The vice of this ruling is the same as in the one already considered. The jury were not clearly informed as to their power in the exercise of a sound discretion.

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The defendant was entitled to the charge as requested, without change or comment.

In *Remsen v. People* (43 N. Y., at page 8) this court said: "There is no case in which the jury may not, in the exercise of a sound judgment, give a prisoner the benefit of a previous good character. No matter how conclusive the other testimony may appear to be, the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe, in view of the improbabilities that a person of such character would be guilty of the offense charged, that the other evidence in the case is false, or the witnesses mistaken. An individual accused of crime is entitled to have it left to the jury * * * whether he, if his character was previously unblemished, has or has not committed the particular crime alleged against him. (2 Russ. Crimes, 785.) The weight of the evidence is for the jury alone to determine. (3 Greenl. Ev. § 25.)"

A late utterance of this court is to the same effect. "Good character may create a doubt against positive evidence, but this doubt against positive evidence is created only when, in the judgment of the jury, the character is so good as to raise a doubt as to the truthfulness or correctness of the positive evidence. In such a case the prisoner must be given the benefit of the doubt." (*People v. Hughson*, 154 N. Y., at page 164, 47 N. E. 1095.)

The judgments of the Appellate Division and the Trial Term should be reversed, and a new trial ordered.

MARTIN, VANN, and CULLEN, JJ., concur. PARKER, C. J., GRAY and WERNER, JJ., concur for reversal upon the sole ground that the trial judge erred in refusing to charge, as requested, "that the character of the accused may be such as to create a doubt in the minds of the jury, and lead them to believe * * * that the other evidence was false."

Judgment of conviction reversed, etc.

AIKEN V. PEOPLE.

183 Ill. 215—55 N. E. Rep. 695.

Opinion Filed December 18, 1899.

CHARACTER: *Improper cross-examination of character-witness as to rumors of specific acts.*

1. A witness who has testified in a criminal case that the general reputation of the accused as to being a peaceable and law-abiding man is good, cannot be asked, on cross-examination, whether he has heard rumors of the accused having been connected with former criminal acts. (CARTWRIGHT, C. J., dissenting.)
2. One on trial for a serious offense has the right to have the evidence confined to the charge in the indictment, and the admission of evidence having a tendency to excite the passion or prejudice of the jury, and which has no legitimate bearing upon the crime charged, cannot be said to be harmless error.

Supreme Court of Illinois.

Writ of error to the Circuit Court of McDonough County; the Hon. John J. Glenn, Judge, presiding.

Neece & Son, and Sherman & Tunncliffe, for plaintiff in error.

Tom Benton Camp, State's Attorney, and William H. Holly, for the People.

MR. JUSTICE CRAIG delivered the opinion of the court:

John W. Aiken, the plaintiff in error, was indicted at the May term, 1899, of the Circuit Court of McDonough County, for the crime of murder in producing an abortion upon one Hattie Reece, from the effects of which she died. The indictment contained several counts, in two of which it was alleged the miscarriage was produced by the use of certain instruments the name and description of which were to the grand jurors unknown; two alleged the administering of certain noxious and "abortifacient" drugs to the grand jurors unknown; while the last, or fifth, count alleged the miscarriage was produced by some means to the grand jurors unknown. A motion to quash the indictment was overruled, a plea of not guilty was entered, and on the trial the jury returned a verdict find-

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ing the defendant guilty of murder and fixing his punishment at fifteen years in the penitentiary. Motions for a new trial and in arrest of judgment were overruled and judgment was entered on the verdict. Plaintiff in error brings the case to this court and assigns several errors.

The plaintiff in error had been a practicing physician for thirty-four years in Tennessee, McDonough County, Illinois, while Mrs. Hattie Reece taught in the primary department in a school in Browning, in Schuyler County, in which her husband was principal. It appears from the evidence that she thought she was pregnant and consulted a physician in Browning, and wrote to a physician in Macomb who had previously treated her for some form of female complaint, and inquired whether he thought she could bear children with safety. She also wrote Dr. Aiken, the plaintiff in error, and two or three letters passed between them. The letters themselves were not in evidence, but secondary evidence of what purported to be their contents was given by the husband of deceased, for the People, and by the plaintiff in error as a witness in his own behalf. Mrs. Reece came to Tennessee on Friday evening, the 4th day of March, 1899, and was accompanied from the depot to the hotel by Dr. Aiken, who had engaged a room for her. The doctor called on her on Saturday, and she was in bed all day. Sunday she sat up some and wrote a letter. She went to bed and did not get up again until Thursday, when her husband came. He stayed until Friday night and left on the nine o'clock train. Mrs. Reece was attended by Dr. Aiken, who came there every day until she died, March 16.

The People's evidence introduced to establish the charge was circumstantial in character. The defendant denied that he did anything to produce an abortion, but treated her for piles. Two physicians made a *post mortem* of the deceased at the instance of the coroner of McDonough County, at the village of Tennessee, and testified that in their opinion the death of deceased was caused by a miscarriage. They gave conditions they found as a basis of their opinion, among which were shreds of the afterbirth found. They testified that the *fetus* was two and one-half or three months advanced, and that the abortion would follow the infliction of its causes in from one to six weeks, or, it might be, in twenty-four hours. Both physicians were unable to say whether the miscarriage resulted from an

external cause or some internal natural cause; that it was impossible to tell what caused it, or whether she had committed it on herself.

It is claimed in the argument that the verdict is not sustained by the evidence; but as the judgment will have to be reversed for an erroneous ruling on the admission of evidence we prefer not to discuss the evidence, for the reason that what we might say might prejudice the rights of the parties in another trial.

The record shows that the defendant introduced a large number of witnesses, who testified that his general reputation in the neighborhood where he resided, for being a peaceable and law-abiding man, was good. On cross-examination several of the witnesses were asked questions by the People's attorney as to whether they had not heard defendant had violated the criminal law, or been implicated in burning some property, etc. William Cook, who had known defendant for forty years and testified his reputation as a peaceable and law-abiding man was good, was asked by the People, on cross-examination, against defendant's objection:

Q. "Did you ever hear any talk about trouble between him and a woman, or any woman, of a criminal character? (Question objected to by defendant's counsel, objection overruled, and exception.)

A. "Why, I have heard a great many things what Dr. Aiken should have been implicated in, in regard to women. Whether a word of it is true I don't know.

Q. "Did you ever hear anything to the effect—any rumor—that he had assisted any woman or women in getting rid of a child? (Objection; overruled, and exception.)

A. "No, sir."

Frank Eakle, who testified his (defendant's) reputation was good, on cross-examination, against the objection of defendant, was asked by the People:

Q. "Did you hear it rumored or said that the doctor had been mixed up or implicated in any way in the burning of any property down there in that neighborhood?

A. "A good many years ago there was some talk of that kind.

Q. "I will ask you if you have at any time heard it stated

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or talked or rumored—not saying it is true, understand—that he had committed an abortion or miscarriage on any woman?

A. "No, sir."

Charles Cook was asked by the People, on cross-examination, against the objection of the defendant:

Q. "Have you ever heard these people talking—say that he had committed some crime, for violation of a law?"

A. "Yes, one time—it has been a good many years ago—about the time Hill's Grove was laid out."

Mike Doran was asked, on cross-examination, against the objection of defendant:

Q. "Have you heard some rumor during that time—have you ever heard him charged with committing some crime?"

A. "Yes, a number of years ago."

Q. "He was charged at that time with burning some farmer's property?"

A. "Yes, sir."

Q. "Some man he had trouble with?"

A. "I think that is the case."

Robert Miller testified that his general reputation for being a peaceable and law-abiding man was good, and was asked, on cross-examination, against defendant's objection:

Q. "Have you heard rumors that he had been doing work of the same kind charged in this case?"

A. "No, sir."

Q. "Have you heard him charged with other crimes in that neighborhood?"

A. "Yes, sir."

Amos Lawyer was permitted to be asked, against the objection of defendant:

Q. "Have you ever heard, at any time, anybody express any opinion as to Dr. Aiken being connected with some offense against the laws of this State?"

A. "I have; have heard it probably a dozen times."

Q. "And have you heard very many positive declarations as to whether he was not guilty of another offense? (Question objected to by defendant's counsel, overruled, and exception.)"

A. "Of course, in the community some think he was and some think he was not. I have heard this in relation to more

than one offense against the law in which the doctor was interested or implicated."

The general character of a person is the estimate in which he is held in the neighborhood where he has resided. In some cases of circumstantial evidence, where the evidence for the People and the defendant is nearly balanced, good character may be very important to the defendant's defense. This court has held that particular acts of misconduct are never admissible in rebuttal of the defendant's good character. In *McCarty v. People*, 51 Ill. 231, the question arose whether, after the defendant had given evidence of his good character by general reputation, the trial court erred in permitting the prosecution to give in evidence particular acts of misconduct or crime in rebuttal—and that by rumors and reports in the country. The court held the admission of the evidence erroneous and reversed the judgment for that error alone. In the decision of the case it was said: "Were this the law, no person arraigned for crime, in which his uniform good character prior to the alleged offense, which this court has said is an element proper for the jury to consider in the trial of all offenses, had been established by testimony, would incur the risk attendant upon the production of such proof, if it could be rebutted by proof of rumors or reports of particular aberrations. Every man is presumed ready at all times to defend his general character but not his individual acts. Of those he must have due notice. No matter how pure one's life may be, he would hardly venture upon the proof if to be followed by such consequences." This rule was recognized and approved in *Gifford v. People*, 87 Ill. 210, where Gifford, the plaintiff in error, was convicted of the crime of rape. On the cross-examination of Prosper Washburn, a witness introduced by the defendant to prove former good character, he was asked, "Have you not heard people say that he (alluding to the defendant) was a gambler or gambled?" This was objected to, but the objection was overruled by the court and the witness answered that he had heard some say he gambled. Again, when the defendant gave evidence in his own behalf, he was compelled, over his counsel's objection, to state that he had visited houses of ill-fame in Cleveland and Chicago, and of the number of times, and of having had connection with their inmates, and also that he had played cards for money. In

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passing on the question it was said (p. 214): "We have no doubt this evidence seriously prejudiced the defendant with the jury. Evidence of prior misconduct is never admissible in a criminal trial unless it be to prove prior malice towards an individual, or guilty knowledge, neither of which can have pertinency in cases like the present. (1 Wharton on Crim. Law—7th ed.—sec. 639; Roscoe on Crim. Evidence—5th Am. ed.—p. 97; 1 Phillips on Evidence,—Cowen, Hill & Edw. notes—p. 765.) And particular acts of misconduct are never admissible in rebuttal of proof of the defendant's good character. (*McCarty v. People*, 51 Ill. 231.) Nor can it be said this evidence was admissible for the purpose of impeaching the defendant's reputation as a witness, only, although not for the purpose of proving the offense charged. The reputation of a witness cannot be impeached by proof of particular acts; it must be by proving his general reputation for truth and veracity to be bad.—*Frye v. Bank of Illinois*, 11 Ill. 367; *Eason v. Chapman*, 21 *id.* 33; *Crabtree v. Kile*, *id.* 180; *Hansell v. Erickson*, 28 *id.* 257; *Dimick v. Downs*, 82 *id.* 570."

In Wharton on Criminal Evidence (sec. 61) the author says: "Where a defendant has voluntarily put his character in issue and evidence for the prosecution has been introduced in rebuttal, it has been said that the examination may be extended to particular facts, though this has properly been denied in most jurisdictions; and viewing the question in regard to principle, we must hold it to be oppressive to a defendant, as well as irrelevant to the real issue, to admit in rebuttal, on whatever pretext, a series of independent facts forming each a constituent offense." In support of the text the author cites in a note eighteen well considered cases, both English and American.

Under the rule established in the cases cited it is apparent that the court erred in the admission of the evidence complained of. There is no ground for holding that the evidence, although inadmissible, did no harm. It must be remembered that the defendant was on trial for a serious crime and it was his right to have the evidence confined to the charge in the indictment, and evidence which had a tendency to excite the passion or prejudice of the jury, as the evidence in question certainly did, and which had no legitimate bearing on the

charge upon which the defendant was arraigned, could not do otherwise than lead to an erroneous verdict.

For the error indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

MR. CHIEF JUSTICE CARTWRIGHT, dissenting:

The testimony of a witness as to whether general reputation is good or bad is his conclusion from all the information he has on that subject, including the existence or the absence of charges against the person and expressions of people. I understand the rule to be, that on cross-examination the sources and the nature of such information may be inquired into for the purpose of showing the grounds of the estimate given by the witness and testing his credibility. It is not proper to prove, in rebuttal, specific acts of misconduct, but the usual tests may be applied to determine whether the witness testifies truly. Such cross-examination is not permitted for the purpose of proving the particular fact but to weaken the force of the direct testimony. Under this rule a witness who testifies to good reputation may be cross-examined concerning specific facts and rumors which are inconsistent with his direct testimony. The rule is sustained by the following authorities: *Best on Evidence*, sec. 261; 1 *Taylor on Evidence*, par. 257, notes 39, 47; *People v. Pyckett*, 99 Mich. 613; *Jackson v. State*, 78 Ala. 473; *Carpenter v. Blake*, 10 Hun, 358; *Thompson v. State*, 100 Ala. 70; *State v. Crow*, 107 Mo. 341; *Leonard v. Allen*, 11 Cush. 241; *Commonwealth v. O'Brien*, 119 Mass. 342; *State v. Jerome*, 33 Conn. 265; *State v. Arnold*, 12 Iowa, 479; *Oliver v. Pale*, 43 Ind. 132; *People v. McKane*, 143 N. Y. 455; 1 *Thompson on Trials*, par. 524; 8 *Enc. of Pl. & Pr.* 115. In the case of *McCarty v. People*, 51 Ill. 231, the objectionable evidence was admitted in rebuttal, and the rule is, that proof of particular acts is not admissible in rebuttal. The decision in *Gifford v. People*, 87 Ill. 210, was based on what ground alone, and this question was not considered.

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STATE v. AUSTIN.

129 N. C. 534—40 S. E. Rep. 4.

Decided November 26, 1901.

CIRCUMSTANTIAL EVIDENCE—LARCENY: *Doctrine of circumstantial evidence—Each circumstance must be relevant, and, tend to show guilt—Accumulation of irrelevant facts insufficient—The chain no stronger than the weakest link—Finding stolen money at a public place not under the accused's control, irrelevant; and the jury should have been so instructed.*

1. In making out a case of circumstantial evidence, each individual circumstance must of itself at least tend to prove guilt, before it is admitted in evidence. Accumulation of irrelevant facts do not prove a charge beyond all reasonable doubt. The chain of circumstances cannot be stronger than any one necessary link.
2. In the afternoon of the second day after the accused was arrested and in the meantime kept in close custody, a shot-bag containing \$35.00 was found lying exposed in a public field, which was used as a camping ground; there being no evidence to show how it got there; nor that the accused put it there. *Field*, that it was error to refuse to instruct the jury that such fact of finding, was not a circumstance against the accused and should not be considered against him.

Appeal from Superior Court, Rowan County; Hon. A. L. Coble, Judge.

J. E. Austin, convicted of larceny, appeals. Reversed.

T. F. Klutts, for the appellant.

Brown Shepherd for *Robert D. Gilmer*, Attorney General, for the State.

DOUGLAS, J. This is a conviction for the larceny of money from one Surratt. The evidence is entirely circumstantial. There are various exceptions, but only one that we think necessary to consider. The defendant's sixteenth prayer for instruction is as follows:

"In this case there is no evidence that the lot on which the bag of money is said to have been found was at any time in the actual or constructive possession of the defendant, and therefore, if the jury believe that the money so found was the

property of Surratt, no presumption of defendant's guilt is raised thereby, as the defendant had no dominion or control over said premises (and the alleged finding of said money on said lot is not a circumstance against the defendant in this case)."

His Honor gave the instruction as asked, except the latter part that is in parentheses. This, we think, he should have given, in view of the evidence. It appears from the evidence that the defendant was arrested and put in jail on the night or evening of July 3rd, and remained in jail for more than a month. In the afternoon of the second day after his arrest and imprisonment one of the witnesses found \$35 in money in a shot-sack lying exposed in a public lot used as a camping lot. It does not appear how it got there, and there is no evidence even tending to show that the defendant had put it there. It does appear that he was held in close custody after his arrest, and had no opportunity thereafter of getting to the lot. The loss of the money seems to have been generally known, and it seems improbable that it should have lain in so public a place for two days without attracting attention. The mere fact of its being found there under such circumstances is no evidence that the defendant put it there, and therefore no evidence of his guilt. Every one of the general public had equal facilities of putting it there with the defendant. It is true they did not all have equal facilities for stealing it, but, while that fact might be a circumstance to go to the jury, it is not corroborated by the further fact of the money being found in a public lot two days after the defendant's imprisonment.

Circumstantial evidence may be of two kinds, consisting either of a number of consecutive links, each depending upon the other, or a number of independent circumstances all pointing in the same direction. In the former case it is said that each link must be complete in itself, and that the resulting chain cannot be stronger than its weakest link. In the latter case the individual circumstances are compared to the strands in a rope, where no one of them may be sufficient in itself, but altogether may be strong enough to prove the guilt of the defendant beyond a reasonable doubt. But it necessarily follows that in either case every individual circumstance must in itself at least *tend* to prove the defendant's guilt before it can be admitted as evidence. No possible accumulation of

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irrelevant facts could ever satisfy the minds of the jury beyond a reasonable doubt.

His Honor properly charged that, "in order to justify the inference of guilt from circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt." In furtherance of this instruction, and as its natural corollary, he should have instructed the jury under the facts of this case that the mere finding of the money in the public lot did not tend to prove the guilt of the defendant, and therefore should not be considered by them. For his failure to do so at the prayer of the defendant, a new trial must be ordered.

New trial.

BROWN v. COMMONWEALTH.

97 Va. 791—34 S. E. Rep. 882.

Decided January 18, 1900.

CIRCUMSTANTIAL EVIDENCE: *Obstructing car track—Insufficient evidence.*

1. Guilt is not to be inferred from facts consistent with guilt, but not inconsistent with innocence.
2. The accused was ejected from a car, and shortly after, on its return trip, and about a mile from the place, it collided with an obstruction. The accused had made a threat against the motor-man; was seen near the track bareheaded and in an excited condition a few minutes before the accident, and his hat was found near the place where he had been put off. *Held*, that the testimony did not create more than a suspicion, and that it was doubtful, inconclusive and insufficient.

Supreme Court of Appeals of Virginia.

Error to Henrico County Court.

William Brown, convicted of obstructing a car, brings error.
Reversed.

William H. Beveridge, for the plaintiff in error.

A. J. Montague, Attorney General, for the Commonwealth.

CARDWELL, J. William Brown was indicted in the County Court of Henrico County for feloniously and maliciously obstructing a car upon the railroad leading from Richmond City to Seven Pines, in the County of Henrico, by putting and placing a large piece of timber upon the track of the railroad, with intent to derail the car, and thereby endanger the life and safety of the passengers therein. Upon his trial he was found guilty, and sentenced to the penitentiary for four years. He thereupon applied for a writ of error to the Circuit Court of Henrico County, which was refused, and the case is now before us upon a writ of error awarded by one of the judges of this court.

Error is assigned to the action of the County Court in refusing the two instructions asked for by the accused and in giving others in lieu thereof. In this the court did not err. The instructions it gave are a clear, accurate, and careful statement of the law as applied to the evidence in this case.

Of the remaining assignments of error we need consider only that to the refusal of the court to set aside the verdict as contrary to the law and the evidence.

The accused took the car in question in Richmond at 11:45 p. m., September 17, 1898, to go to Seven Pines, and when it had proceeded a little over half of the distance he was ejected for disorderly conduct. The car continued on its route to Seven Pines, and promptly returned, reaching, a few minutes after 12 o'clock, the place where it collided with an obstruction in the form of a railroad tie, which had been placed under the rail on one side of the track and over the rail on the other, at a point something over a mile from the point where the accused was ejected. Within three to five minutes before the car struck the obstruction the accused was met on the side of the track, bareheaded, and apparently in rather an excited condition of mind, and was going in the same direction as when last seen. His hat seems to have been lost where he was put off the car; at least, a hat was found there, which the witnesses say, to the best of their knowledge and belief, was his hat, and the one he had on when he was put off. A few minutes after being put off the car, the accused was heard to make the threat that he would "take a rock, and knock * * * out of Ed. Griggs," the motorman who assisted the conductor in putting him off.

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The threat and the loss of the hat constitute the only material evidence that tends in any way to connect the accused with the offense. It cannot be said to create more than a suspicion against him. Taking the whole evidence together, it is of a very doubtful and inconclusive character, and not sufficient to warrant his conviction.

"The guilt of a party is not to be inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence." Hairston's Case, 97 Va. 754, 32 S. E. 797; Bundick's Case, 97 Va. 783, 34 S. E. 454, and authorities cited.

We are therefore of opinion that the County Court erred in refusing to grant the plaintiff in error a new trial, and its judgment must be reversed, the verdict of the jury set aside, and a new trial awarded.

Reversed.

STANLEY v. STATE.

82 Miss. 498—34 So. Rep. 360.

Decided May 18, 1903.

CONFESSIONS—CORPUS-DELICTI.

The *corpus-delicti* cannot be proven by a confession.

Supreme Court of Mississippi, Second District.

Appeal from Circuit Court of Carroll County; Hon. William F. Stevens, Judge.

Sam Stanley, convicted of attempt to poison, appeals. Reversed.

Section 1255 of the Code of 1892, is as follows: "*Mingling poisons with Food, Drink or Medicine, Poisoning Spring, Well, Reservoir of Water, etc.*—Every person who shall mingle any poison with any food, drink or medicine with intent to kill or injure any human being, who shall wilfully poison any well, spring, or reservoir of water, shall upon conviction, be punished by imprisonment in the penitentiary not exceeding ten years, or in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or both."

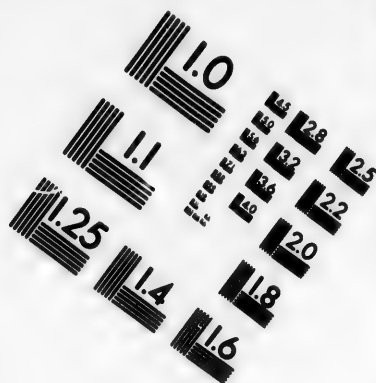
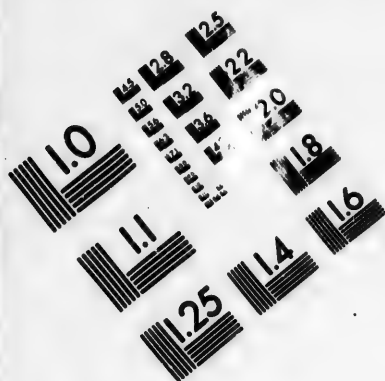
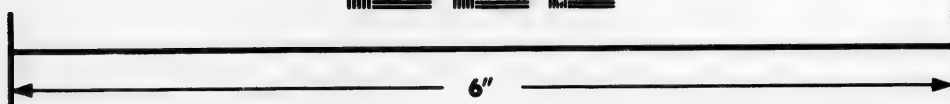
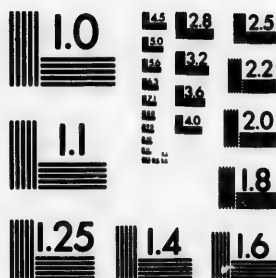


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The indictment charges, that Samuel Stanley did "wilfully, feloniously, and maliciously mingle poison, the kind unknown to the grand jurors, with the food and drink of A. L. Heggie, and other persons unknown, with the intent and in the attempt then and there, of his malice aforethought, to kill and injure the said A. L. Heggie, and other persons to the grand jury unknown."

The defendant was sentenced to serve six months in the county jail.

McClurg & Gardner, for the appellant.

J. N. Flowers, Assistant Attorney General, for appellee.

CALHOON, J. The *corpus delicti* cannot be proved by the confession of an accused person. Without the confession in the case at bar there is no proof of it. The *corpus delicti* here is the mingling of poison with water. The water was bitter, and was spit out without harmful effect. It is not shown that there was poison in it, although the water in the bucket was at hand.

Under *Osborne v. State*, 64 Miss. 320, 1 South. 349, this case must be

Reversed and remanded.

NOTES. (By J. F. G.)—In volumes 11 and 12 we devoted considerable space to the subject of confessions, in the latter volume giving several instances of remarkable confessions. Since then considerable additional information has been obtained, which gives material for these notes.

One of these cases was that of the Trallors, occurring at Springfield, Ill., in 1841. We took our account from 4 Western Law Journal 25, where it was copied from the Quincy *Whig* of April 9, 1846. Since, we have discovered a letter of Abraham Lincoln, which appears in Laman's Life of Lincoln and Wharton and Stille's Medical Jurisprudence. Mr. Laman says that Mr. Lincoln was much impressed with the matter and wrote an account of it for a Quincy newspaper; so, the "member of the Bar" spoken of in the Quincy *Whig* in 1846 (12 Amer. Crim. Rep. 216) may have been Abraham Lincoln. We will give Mr. Lincoln's letter in full, as part of these notes.

Another of the cases, was that of the Boorns, our account of which was taken from 5 Law Reporter 193. Since, we have obtained a pamphlet published by William S. Marsh, at Hartford, Conn., in 1820, which contains:—

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(2) "REV. MR. HAYNES' SERMON UPON THE DEVELOPMENT OF THE MYSTERY."

(3) "A SUCCINCT ACCOUNT OF THE INDICTMENT, TRIAL AND CONVICTION OF STEPPEN AND JESSE BOORN." By S. PUTNAM WALDO.

As a part of these notes we shall give the first and third of these accounts as they there appear, together with the publisher's preface; but shall omit the sermon. However, one feature of the sermon may be entitled to special notice. It is the remarkable theory advanced, that all the net work of circumstances, through which the Boorns were apprehended and convicted, including the thrice unfolding dream, in which the specter of the living assumed the role of the dead, creating a sensation in the neighborhood and "deemed by many as a providential interference for the detection of the murderer," was in fact, simply a means of Providence in removing a stain from the born and unborn Boorns. Upon this phase of the subject the clergyman said:—

"In this remarkable providence you can see judgment and mercy, chastisement and benignity. Affliction in subjecting you for months to a dark and gloomy prison in chains—in being reputed a murderer—cut off from society, your family, and lying under constant sentence of death. But here is divine wisdom and goodness displayed, in reversing the sentence, retrieving your character, etc. Had you been exonerated by the court; or if the process had never commenced, 'tis probable that Colvin would never have been discovered, and a stigma might be fixed on you and your unborn posterity. But God has effectually wiped away the reproach."

Another very valuable, and fuller, account of the trial is in pamphlet form in the library of the Chicago Law Institute.

THE LETTER OF ABRAHAM LINCOLN.

SPRINGFIELD, June 19, 1841.

DEAR SPEED:

We have had the highest state of excitement here for a week past that our community has ever witnessed; and although the public feeling is somewhat allayed, the curious affair which aroused it is very far from being over yet, cleared of mystery. It would take a quire of paper to give you anything like a full account of it, and I, therefore, only propose a brief outline.

The chief personages in the drama are Archibald Fisher, supposed to be murdered, and Archibald Traylor, Henry Traylor, and William Traylor, supposed to have murdered him. The three Traylor's are brothers. The first, Archibald, as you know, lives in town; the second, Henry, in Clary's Grove; and the third, William, in Warren County; and Fischer, the supposed *murdered*, being without a family, had made his home with William. On Saturday evening, being the 29th of May, Fisher and William came to Henry's in a one-horse dearborn, and there staid over Sunday; and on Monday all three came to Springfield (Henry on horseback), and joined Archibald at Myers's, the Dutch carpenter,

That evening at supper Fisher was missing, and so next morning some ineffectual search was made for him; and on Tuesday, at 1 o'clock p. m., William and Henry started home without him. In a day or two Henry and one or two of his Clary Grove neighbors came back for him again, and advertised his disappearance in the papers.

The knowledge of the matter thus far had not been general, and here it dropped entirely till about the 10th inst., when Keys received a letter from the postmaster in Warren County, that William had arrived at home, and was telling a very mysterious and improbable story about the disappearance of Fisher, which induced the community there to suppose he had been disposed of unfairly. Keys made this letter public, which immediately set the whole town and adjoining county agog. And so it has continued until yesterday.

The mass of the people commenced a systematic search for the dead body, while Wickersham was dispatched to arrest Henry Traylor at the Grove, and Jim Maxcy to Warren to arrest William. On Monday last, Henry was brought in, and showed an evident inclination to insinuate that he knew Fisher to be dead, and that Archibald and William had killed him. He said he guessed the body could be found in Spring Creek, between the Beardstown Road and Hickox's mill. Away the people swept like a herd of buffalo, and cut down Hickox's mill-dam *volens volens*, to draw the water out of the pond, and then went up and down, and down and up the creek, fishing and raking, and raking and ducking, and diving for two days; and, after all, no dead body found. In the mean time a sort of a scuffling-ground had been found in the brush in the angle, or point, where the road leading into the woods past the brewery, and the one leading in past the brick grove meet. From the scuffle-ground was the sign of something about the size of a man having been dragged to the edge of the thicket, where joined the track of some small wheeled carriage drawn by one horse, as shown by the road-track. The carriage track led off towards Spring Creek. Near this drag-trail, Dr. Merryman found two hairs, which, after a long scientific examination, he pronounced to be triangular human hair, which term, he says, includes within it the whiskers, the hair growing under the arms, and on other parts of the body; and he judged that these two were of the whiskers, because the ends were cut, showing that they had flourished in the neighborhood of the razor's operations.

On Thursday last Jim Maxcy brought in William Traylor from Warren. On the same day Arch. was arrested, and put in jail. Yesterday (Friday) William was put upon his examining trial before May and Lavelly; Archibald and Henry were both present. Lamborn prosecuted, and Logan, Baker, and your humble servant defended. A great many witnesses were introduced and examined, but I shall only mention those whose testimony seemed most important. The first of these was Capt. Ransdell. He swore that, when William and Henry left Springfield for home on Tuesday before mentioned, they did not take the direct route—which, you know, leads by the butchershop; but that they followed the street north until they got opposite, or nearly

opposite, where he after the towards stated tracks.

Henry when the and turn Archibald placed one the dearborn where that the and he turned him in how, in Grove. that he they di Archibald

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opposite, May's new house, after which he could not see them from where he stood; and it was afterwards proved, that, in about an hour after they started, they came into the street by the butcher's shop from towards the brickyard. Dr. Merryman and others swore to what is stated about the scuffle-ground, drag-trail, whiskers, and carriage tracks.

Henry was then introduced by the prosecution. He swore, that, when they started for home, they went out north, as Ransdell stated, and turned down west by the brick-yard into the woods, and there met Archibald; that they proceeded a small distance further, when he was placed as a sentinel to watch for and announce the approach of any one that might happen that way; that William and Arch. took the dearborn out of the road a small distance to the edge of the thicket, where they stopped, and he saw them lift the body of a man into it; that they moved off with the carriage in the direction of Hickox's mill, and he loitered about for something like an hour, when William returned with the carriage, but without Arch., and said they had put him in a safe place; that they went somehow, he did not know exactly how, into the road close to the brewery, and proceeded on to Clary's Grove. He also stated that some time during the day William told him that he and Arch. had killed Fisher the evening before; that the way they did it was by him (William) knocking him down with a club, and Archibald then choking him to death.

An old man from Warren, called Dr. Gilmore, was then introduced on the part of the defense. He swore that he had known Fisher for several years; that Fisher had resided at his house a long time at each of two different spells; once while he built a barn for him, and once while he was doctored for some chronic disease; that two or three years ago Fisher had a serious hurt in his head by the bursting of a gun, since which he had been subject to continued bad health and occasional aberration of mind. He also stated that on last Tuesday, being the same day that Maxey arrested William Traylor, he (the doctor) was from home in the early part of the day, and on his return, about 11 o'clock, found Fisher at his house in bed, and apparently very unwell; that he asked him how he had come from Springfield; that Fisher said he had come by Peoria, and also told of several other places he had been at, more in the direction of Peoria, which showed that he at the time of speaking did not know where he had been wandering about in a state of derangement. He further stated, that in about two hours he received a note from one of Traylor's friends, advising him of his arrest, and requesting him to go on to Springfield as a witness, to testify as to the state of Fisher's health in former times; that he immediately set off, calling up two of his neighbors as company, and riding all evening and all night, overtook Maxey and William at Lewistown in Fulton County. That Maxey refusing to discharge Traylor upon his statement, his two neighbors returned, and he came on to Springfield. Some question being made as to whether the doctor's story was not a fabrication, several acquaintances of his (among whom was the same postmaster who wrote to Keys as before mentioned) were intro-

duced as sort of compurgators, who swore that they knew the doctor to be of good character for truth and veracity, and generally of good character in every way.

Here the testimony ended, and the Trallors were discharged, Archibald and William expressing, both in word and manner, their entire confidence that Fisher would be found alive at the Doctor's by Gallo-way, Mallory, and Myers, who a day before had been dispatched for that purpose; while Henry still protested that no power on earth could ever show Fisher alive. Thus stands this curious affair.

When the doctor's story was first made public, it was amusing to scan and contemplate the countenances, and hear the remarks of those who had been actively engaged in the search for the dead body; some looked quizzical, some melancholy, and some furiously angry. Porter, who had been very active, swore he always knew the man was not dead, and that he had not stirred an inch to hunt for him. Langford, who had taken the lead in cutting down Hockox's mill-dam, and wanted to hang Hickox for objecting, looked most awfully woebegone; he seemed the "*victim of unrequited affection*," as represented in the comic almanacs we used to laugh over. And Hart, the little drayman that hauled Molly home once, said it was too damned bad to have so much trouble, and no hanging after all.

I commenced this letter yesterday, since which I received yours of the 13th. I stick to my promise to come to Louisville. Nothing new here, except what I have written. I have not seen.....since my last trip; and I am going out there as soon as I mail this letter.

Yours forever,

LINCOLN.

(On page 220 of 12 Amer. Crim. Rep. appears the following:—"On the next Monday, Myers arrived in Springfield, bringing with him the now famed Fisher, in full life and proper person."—J. F. G.)

PREFACE TO THE PAMPHLET CONTAINING THE ACCOUNTS OF THE CASE OF THE BOORNS.

The unusual excitement of the public feeling, in consequence of the recent conviction of STEPHEN and JESSE BOORN, for the murder of RUSSELL COLVIN, more than *seven years since*—the discovery of Colvin, in full life—his return to the place where his mouldering bones were supposed to be discovered, and the narrow escape of the Boorns from ignominious death, induced the publisher to resort to the most authentic sources of intelligence to obtain all the light that was possible, upon a subject enveloped in doubt, darkness and mystery. The highly respected and reverend clergyman, of Manchester, Va. (the scene of this mystery,) has furnished, what the publisher ventures to pronounce, altogether the most satisfactory account of these strange occurrences.

The impressive discourse delivered upon the return of Colvin,

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and the happy rescue of his supposed murderers from impending death, will be read with interest by all.

Copious materials were obtained at the Trial of the *Boorns*; but it is deemed inexpedient *at this time*, to give any but a brief statement of it.

PUBLISHER.

THE NARRATIVE OF REV. LEMUEL HAYNES.

THE wonderful occurrence that has lately been exhibited at Manchester, in relation to the supposed murder, may be ranked among those rare events that seldom, if ever take place. The public mind has been uncommonly agitated. Reports have been circulated, tending to create prejudices, and lead astray. That many things without any foundation in truth, should be spread abroad in a matter so astonishing and interesting, could hardly have been expected. The writer of this narrative believes that there are many things in relation to the event, that may be useful and entertaining, and calculated to throw some light upon this mysterious subject.

Mr. Barna Boorn and his wife, the parents of Stephen and Jesse Boorn, are advanced in age, have been residents of Manchester for about 40 years, and are persons of respectability. they have three sons and two daughters; they all have families. Sally Boorn was married to Russell Colvin eighteen years ago. They have children: their eldest sons name is Lewis; another is Rufus. Of the latter his father was very fond, and used often to carry him from place to place on his back. Colvin had been in a state of mental derangement for a long time, by which he was incapacitated to attend to the concerns of his family, who were dispersed among the connections. Colvin's parents formerly resided in Manchester; but are both dead. He has a brother supposed to live in the western country. He has a sister named Clarissa, who is mentioned in Mr. Chadwick's letter. The sudden departure of Colvin, which was seven years ago the 7th day of May last, excited some inquiry about what had become of him; but as he had frequently absented, (at one time he was gone nine or ten months, and was heard of at Rhode-Island,) it was expected he would return as usual. There were, however, some surmises that possibly he had been murdered. Many observations were made by Stephen and Jesse Boorn that excited jealousies that they were guilty.

With respect to *dreaming*, about which so much has been said and published, it may be remarked, that there has been much said about the murder, and conjectures where it was committed; and where the body might be deposited. By this the mind was prepared to receive similar impressions when asleep; and there was nothing miraculous in the matter, about which so many strange things have been circulated. The dream is here related for the sole purpose of correcting those fabulous reports, of which the hu-

man mind is too susceptible.—A Mr. Boorn* dreamed that Russel Colvin came to his bed side, and told him that he had been murdered, and he must follow him, and he would lead him to the spot where he was buried: this was repeated three times. The deposit was the place talked of previous to the dream, which was where an house had formerly stood, under which was a hole about four feet square, which was made for the purpose of burying potatoes and now filled up. This pit was opened, and nothing discovered but a large knife, a penknife, and a button. Mrs. Colvin, anterior to their being presented to her described them, accurately, and on seeing them said they belonged to her husband, except the small knife.

An impresson made on the mind by previous circumstances, may dictate a dream, which is commonly the case, and nothing strange, should it have influence in the present affair, in *searching* after truth; but that any decision was predicated in the least on such nocturnal fancies, we have no evidence. They were not mentioned on occasions of enquiry, before court or jury. Perhaps the court had never heard of them. It is certainly to be regretted that such seeds of delusion should be disseminated among mankind, and that truth and propriety do not receive more attention previous to such publications. Much has been said about skulls and bones being found of the human kind. I think we are without sufficient evidence that anything of this nature has been discovered. A circumstance took place that excited much attention. A lad walking from Mr. Barna Boorn's at a small distance with his dog, a hollow stump standing near the path engaged the notice of the Spaniel, which ran to the place and back again several times, lifting up his feet on the boy, with whining notes, as though to draw the attention of his little master to the place; which had the effect. A cluster of bones were drawn from the roots of the stump by the dogs paws. Further examination was made, and in the cavity of the stump were found two toe nails, to appearance belonging to a human foot; others were discovered in a crumbled state, which to appearance, had passed through the fire. It was now concluded by many, that some fragments of the body of Colvin were found. The cluster of bones were brought before the court of inquiry. They were examined by a number of physicians, who thought them to be human; one of the profession, however, thought otherwise. A Mr. Salisbury, about four years ago had his leg amputated, which was buried at the distance of four or five miles. The limb was dug up, and by comparing, it was universally determined that the bones were not human. However, it was clear that the nails were human, and so appeared to all beholders. The bones were in a degree pulverised, but some pieces were in a tolerable state of preservation. Suspensions were excited that the

*Uncle to the aforesaid Stephen and Jesse, and a gentleman of respectability, whose character is unimpeachable.

body was burnt, and some part not consumed, cast into the stump and other bones put among them for deception. Sometime after the departure of Colvin, a barn belonging to Mr. Barna Boorn was consumed by fire accidentally: it was conjectured that the body was taken up and concealed under the floor of the barn and mostly consumed. About that time a log-heap was burnt by the Boorns near the place where the body was supposed to be deposited: it was thought by some that it was consumed there.

Some indeed looked upon the manner of the discovery as a kind of prodigy; others with more propriety that there was nothing marvelous in the affair; that the dog was allured to the spot by scent or game, which was common to the species. The attention of people was greatly excited; they had strong prepossessions that murder had been committed; by which some were prepared to look even on common things as supernatural. But still, as has before been observed, none of these things were introduced or even mentioned in any part of the examination or trial. The strange disappearance of Colvin, his not being heard of, together with some things that took place on the day he was missing, could not fail to create strong suspicions that he had been murdered. Evidence was adduced, that on the day of his departure, a quarrel commenced between him and his brethren, which led to believe he had fallen a victim. But after all, the evidence was circumstantial, though the general evidence was that the prisoners were guilty. Some thought that it was best to dismiss Jesse from any further examination, which had commenced on Tuesday the 27th day of April. He was however still kept in custody. Search was made on Tuesday, Wednesday, Thursday and Friday, for the body, during which time those discoveries were made above alluded to. Jesse was on the eve of being set at liberty, but on Saturday, about ten o'clock, he with a trembling voice observed, "that the first time he had an idea his brother Stephen had murdered Colvin was when he was here last winter: he then stated that he and Russel were hoeing in the Glazier lot, that there was a quarrel between them, and Colvin attempted to run away; that he struck him with a club or stone, on the back part of his neck or head, and had fractured his skull and supposed he was dead. He observed that he could not tell what had become of the body. He mentioned many places where perhaps it might be found. Search was accordingly made, but to no purpose.

The authority issued a warrant to apprehend Stephen, who, about two years before had removed to Denmark, Lewis County, State of New-York, 198 miles. Capt. Truman Hill, grand jurymen for the town of Manchester, Esq. Raymond and Mr. R. Anderson, set out for Denmark, and arrived there in three days. They called on Mr. Eleazer S. Sylvester, inn-keeper, who in the night, together with a Mr. Orange Clark, and Mr. Hooper, belonging to the town, accompanied them to the house of the supposed crimi-

nal. Mr. Clark went in first, and began some conversation about temporal concerns; the others surrounded the house, and he was easily taken. The surprise and distress of Mrs. Boorn on this occasion, is not easily described; it excited the compassion of those who had come to take away her husband, and they made her some presents. The prisoner was put in irons, and was brought to Manchester on the 15th day of May. He peremptorily asserted innocence, and declared he knew nothing about the murder of his brother-in-law. The prisoners were kept apart for a time, and assigned to separate cells. Nothing material transpired, and they were afterwards confined in one room. Stephen denied the evidence brought against him by Jesse, and treated him with severity. Both the prisoners were repeatedly admonished to pay the strictest regard to truth. Many days were taken up in public examinations of the reputed criminals. Evidence was brought forward which was much against them. Lewis, son of Colvin, testified that he saw his uncle Stephen knock down his father, was frightened and ran home. This witness is before the public.—Jesse Boorn, after an interview with his brother, denied that Stephen ever told him that he killed Colvin, and that what he had reported about him was false. Evidence appeared so strong against the prisoners, that they were bound over to await their trial at the sitting of the Supreme Court, to be holden at Manchester, the third Tuesday of September.

During the interval, the writer frequently visited them in his official capacity: but did not discover any symptoms of compunction; but they persisted in declaring their innocence, with appeals to Heaven. Stephen, in particular, at times, appeared absorbed in passion and impatience. One day I introduced the example of Christ under sufferings, as a pattern worthy of his imitation; he exclaimed, "I am as innocent as Jesus Christ!" for which extravagant expression I reproved him: he replied, "I don't mean that I am guiltless as he was, I know I am a great sinner; but I am as innocent of killing Colvin as he was." The Court sat in September; a judicious and impressive charge was given to the grand jury, by his Honor Judge Doolittle, and a bill of indictment was presented against Stephen and Jesse Boorn: but as it was not a full court, the trial could not commence, according to a late act of the Legislature of this State.

The Court was accordingly adjourned to the 26th of October, 1819. It was with much difficulty that a jury was obtained; but few could be found who had not expressed their opinion against the prisoners. The Hon. Judge Skinner, and Mr. L. Sergeant were counsel for the prisoners. Mr. C. Sheldon, late States Attorney, was employed in behalf of the State. The counsel on both sides discovered much zeal and ability. The trial commenced on Tuesday the 27th day of October, and continued until Saturday night following.

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Stephen and Jesse Doorn, for the murder of Russel Colvin, to which they pled NOT GUILTY. The occasion excited uncommon attention. Six hundred people attended each day, during the trial. Much evidence was introduced which was rejected by the Court, as being irrelevant. The case was given to the jury, after a short, judicious and impressive charge by his Honor Judge Doolittle, which was followed by a lengthy, and appropriate one, by the Hon. Judge Chase. The jury retired, and within about one hour returned; and in compliance with a request of Mr. Skinner, they were severally enquired of whether they had agreed upon a verdict, and each agreed that they had found both of the prisoners guilty of the murder charged against them. The verdict was then publicly read by the clerk. After a short recess, his Honor Judge Chase, with the most tender and sympathetic emotion, which he was unable to suppress, pronounced the awful sentence, "that the criminals be remanded back to prison, and that on the 28th day of January next, between the hours of ten and two o'clock, they be hanged by the neck until each of them be dead! and may the Lord have mercy on their souls."

None can express the confusion and anguish into which the prisoners were cast on hearing their doom. They requested by their council, liberty to speak, which was granted. In sighs and broken accents, they asserted their innocence. The convulsion of nature attending Stephen at last, was so great as to render him unable to walk; but was supported by others, and carried to prison. The compassion of some was excited, especially towards Jesse, which inclined them immediately to send a petition to the legislature, then sitting at Montpelier, praying that the punishment of the criminals might be commuted for that of imprisonment for life. But few, however, signed the petition in favor of Stephen. The assembly spent several days on the subject, and finally granted the request of Jesse, yeas 104, nays 31. The request of Stephen was negatived in the house, yeas 42, nays 97. The decision of the Assembly was brought to Manchester by His Excellency Gov. Galusha, and immediately communicated to the prisoners. Jesse received the news with peculiar satisfaction; while Stephen was greatly depressed, being wholly left without hope. Jesse lamented that his brother could not share in the same comparative blessing with him, and that they could not be fellow-prisoners together. Little did these brothers think that the fate of Stephen would terminate more favorable than that of Jesse, and be the cause of a more speedy deliverance. 'Tis often the case, that the darkest dispensations of divine providence are presages of the rising morning. This should teach us always to trust in the Lord, and consider that although clouds and darkness are round about him, yet justice and judgment are the habitation of his throne.

On the 29th day of October, Jesse took a final farewell of his brother, of his friends, and family at Manchester, and was carried to the State-prison at Windsor, expecting to spend the remainder of his life there. None can express the melancholly situation of Stephen, the poor prisoner: separated from wife and children, parents

and friends, under sentence of death, without hope. I visited him frequently with sympathy and grief, and endeavored to turn his mind on the things of another world; telling him that as all human means failed, he must look to God as the only way of deliverance. I advised him to read the holy scriptures, to which he consented, if he could be allowed a candle, as his cell was dark; this request was granted; and I often found him reading. He was at times calm; and again impatient. The interview I had with him a few days before the news came that it was likely that Colvin was alive, was very affecting. He says to me, "Mr. Haynes, I see no way but I must die; every thing works against me; but I am an innocent man: this you will know after I am dead." He burst into a flood of tears, and said, "What will become of my poor wife and children; they are in needy circumstances, and I love them better than life itself." I told him God would take care of them. He replied, "I don't want to die. I wish they would let me live even in this situation, some longer: perhaps something will take place that will convince people that I am innocent." I was about to leave the prison, when he said, "Will you pray with me?" He arose with his heavy chains on his hands and legs, being also chained down to the floor, and stood on his feet during prayer, with deep and bitter sighs. *A Mr. Taber Chadwick, of Shrewsbury, Monmouth County, New-Jersey, brother-in-law of Mr. Wm. Polhamus, in Dover, N. J., where Colvin had lived ever since April, 1813, seeing the account of the trial of the Boorns at Manchester, he wrote the letter that has been so often published. When the letter came to town, every one was struck with consternation. A few partly believed; but the main doubted. "It cannot be that Colvin is alive," was the general cry. Mr. Chadwick's letter was carried to the prisoner, and read to Stephen; the news was so overwhelming that, to use his own language, nature could scarcely sustain the shock; but as there was some doubt as to the truth of the report, it tended to prevent an immediate dissolution. He observed to me, "that he believed that had Colvin then made his appearance, it would have caused immediate death. Even now, a faintness was created that was painful to endure." Soon a letter was sent to Manchester, informing that there was a probability that the man supposed to be murdered, was yet alive, and that Mr. Whelpley, of New-York, formerly of Manchester, and who was intimately acquainted with Colvin, had actually gone to New-Jersey in quest of him. Thus there was increasing evidence in confirmation of the letter. As soon as Mr. Whelpley had returned to New-York, he immediately wrote, "that he had Colvin with him." A Mr. Rempton, a former acquaintance of Russel's, wrote to his friend here, "that while writing, Russel Colvin is before me." A New York paper announced his arrival also, and that he would soon set out for Vermont. Notwithstanding all this, many gave no credit to the report, but considered it a mere

*Mr. Chadwick and Mr. Polhamus, live distant from each other about 40 miles.

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deception. Large bets were made. On the 22d of December, Colvin arrived in the stage with Mr. Whelply at Bennington. The County Court being then in session, all were filled with astonishment and surprise. The Court suspended business for some hours, to gaze upon one who in a sense had been dead, and is alive again. Many who formerly knew him, now saw that there could be no deception: Russel could call many of them by name. Toward evening, the same day, he came to Manchester; notice being given that he was near at hand, a cry was heard, "*Colvin has come!*" The stage was driven swiftly, and a signal extended: it was all bustle and confusion. The stage stopped at Capt. Black's Inn. The village was all alive; all were running to obtain sight of the man, who they had no doubt was dead, and had come as a kind of Saviour to one who was devoted to the gibbet. Some, like Thomas, in another case, would not believe without tangible evidence. People gathered around him with such eagerness, as to render it impossible to press through the crowd, or obtain a sight of him. Almost all his old acquaintance he could recognize, and call them by name. Several guns were discharged for joy; people ran to different parts of the town to give notice. The prison door was unbolted, the news proclaimed to Stephen, that Colvin had come! The welcome reception given it by the joyful prisoner, need not be mentioned. The chains on his arms were taken off, while those on his legs remained: being impatient of an interview with him who had come to bring salvation, they met. Colvin gazed upon the chains and asked, "What is that for?" Stephen answers, "Because they say I murdered you." Russel replied, "You never hurt me." His wife and friends and people from every part of the town were collected—Joy and gladness sat on every countenance. Many shouts of rejoicing were heard, together with the discharge of cannon. The news having been spread, that Colvin had come to Manchester, the next day there was a large collection from the neighboring towns, who met to behold the returned exile, and to express their high satisfaction on the occasion. I think I can say, that I scarcely ever saw more exultation and tender sympathy, on any occasion. Not less than fifty cannon were discharged, and at a seasonable hour they returned to their places of abode. Mrs. Colvin came to see her husband, but he took but little notice of her, intimating that she did not belong to him. Some of his children came to see him, of whom he appeared somewhat fond. He wondered how they came here, as he said "he left them in New Jersey, and must take them back. He fancies that he is the owner of the farm belonging to Mr. Polhamus, in Dover; talks much about his property there. It is observed by those who formerly knew him, that his mental derangement is much greater than it was when he left Manchester. Many things that took place years ago he can recollect with accuracy, and describes with a degree of propriety. He discovers a placid and harmless disposition. The family where he resided in New-Jersey are fond of him, wish him to return, and spend his days with them, of which he seems very desirous: accordingly, on the 29th of

December he set out from Manchester, with Mr. Whelply, for New-York, who engaged to convey him from thence to his former habitation, in New-Jersey; having received remuneration from this town for that purpose. There it is probable Colvin will end his days. Stephen is not in a state of confinement, but lives with his family. Jesse is still in State's prison, has heard the news, and has wrote to his attorney to use means for his release. It is probable that the honourable court will provide some way by which they may obtain a legal dismission at their session, which is at Bennington on the 3d Tuesday of January inst.

The writer would observe, that publishing the above narrative, was the effect of friendly importunity. It may be expected that imputations of an unwarranted nature, on the town of Manchester, and on the civil authority of Vermont, will be made; but I am fully of the opinion, was the matter well understood, that the judicious and candid would be satisfied.

It must be acknowledged, that it is one of the most mysterious events recorded in the annals of time. There are circumstances attending it which are still enveloped in obscurity, that human sagacity cannot explore.—Has there murder been committed at Manchester? is a question often suggested by people abroad. We are ready to answer, that evidence, to prove such an event, does not appear. One thing we are sure of, that Russel Colvin has not been murdered; and that the prisoners condemned are, and ought to be exonerated.

LEMUEL HAYNES.

Manchester, Vt., 1820.

ADDITION.—About four years after Colvin was missing, some children of Mr. Johnson's near the place where it was supposed that the murder had been committed, found a hat; they carried it home: all agreed that it was Colvin's hat: it was in such an injured state that it was pulled in pieces and thrown away.—Colvin was unwilling to return to Vermont with Mr. Whelply, who was obliged to have recourse to stratagem. A young woman of Russel's acquaintance agreed to accompany him, pretending that they only designed a visit to New-York. While there she was missing, which excited some uneasiness in the mind of the returning exile. While staying a few days at New-York, to prevent his returning, Mr. Whelply told him there were British men of war laying in the harbor, and unless he kept within doors he would be kidnaped. This had the desired effect. Colvin when he set out for Manchester, concluded that he was on his way home to New-Jersey, and never perceived the deception until he came to Bennington, and saw many people with whom he had formerly been acquainted, and he was filled with surprise.

THE ACCOUNT AS GIVEN BY S. PUTNAM WALDO.

THE moral sense of the people of our Republic, is not perhaps evinced more clearly by any fact, than the universal horror that is

felt at the shedding of human blood. In many portions of the old world, violent deaths produce little more emotion, than those which are occasioned by the ordinary laws of nature. The victims of the highwayman, and the midnight assassin, are silently entombed, and the murderer is either feebly pursued or suffered to escape without an attempt to bring him to punishment.

How different is the case in our own beloved country! No sooner is it known that human blood has been shed, and like the blood of Abel "*cries from the ground*," than the whole population is in a commotion. A voluntary "hue and cry" is raised—every nook and corner of the country is scoured; and the blood-stained murderer may almost as well escape from the righteous vengeance of heaven, as from the punishment inflicted by human tribunals.

Wherever the blood of man stains the ground, the people inhabiting that portion of our country, seem to consider themselves as implicated in the guilt, until the murderer is discovered and brought to punishment. The people of Dedham scarcely rested until *Fairbanks*, the murderer of Miss *Fales*, was brought to condign punishment. The people of Wilbraham and the adjoining country, hardly gave "sleep to their eyes, or slumber to their eye-lids," until *Halligan* and *Dayly* atoned for the murder of *Lyon* upon the gallows. A long catalogue of instances might be mentioned to evince the general prevalence of this sentiment. It is a sentiment that does honor to human nature—a sentiment that peculiarly marks the character of our countrymen.

But the "*corruption of the best things become the worst*." While we acquiesce with solemn satisfaction in the punishment of those whose guilt is rendered *indubitable*, we thrill, with inexpressible horror, at the idea that an *innocent* human being should be launched into eternity by the judgment of an human tribunal. Humanity is stamped in indelible characters upon the LAWS of our country; and although the severest of them *must* be executed, it should never be forgotten that—"mercy tempers justice."

The *certainty* of guilt should be rendered as clear as the certainty of punishment; and as long as a *doubt* remains of the guilt of a man upon trial for his life, that *doubt*, according to the humane principles of our law, amounts to *acquittal*.—One of the most profound sages of Jurisprudence who ever honored the bench of Justice, or graced its pure *ermine*, promulgated a position which ought to be engraved in letters of gold in every hall of Justice—"IT IS BETTER THAT TEN GUILTY MEN SHOULD ESCAPE, THAN THAT ONE INNOCENT MAN SHOULD SUFFER DEATH."

The *recent* conviction of STEPHEN and JESSE BOORN for the murder of RUSSELL COLVIN, more than *seven years* since, has produced a sensation through the whole extent of our vast country. The whole transactions connected with this event, are so completely involved in mystery, that a full development of them is hardly to be expected. As soon as it was supposed that somebody had been murdered at Ma-

chester, the people of that vicinity absolutely seemed to be driven into a state of infatuation. The history of *witchcraft* itself scarcely can furnish a parallel; and a more melancholly delusion seemed never to have taken possession of the human mind. Else why should so many people be deceived in the very fact whether human bones were found or not? The *ghost* of Colvin seemed to have had, if possible, a more serious effect upon the minds of the people, than that of the King of Denmark upon Hamlet. He maintained "*method in his madness*," and resorted to measures far different from chains, dungeons, threats and denunciations, to discover the murderer of his father. Far be it from the intention of the writer, in the remotest degree, to impeach the judgment of the highly respectable court, by whom the unhappy Boorns were sentenced to death. Equally far be it from his intention, in the least to affect the respectable jury upon whose verdict the awful sentence of death was pronounced. The *evidence* presented to them rendered the guilt of the prisoners too clear for any other result. But the *manner* in which the evidence was obtained, was so extraordinary—so unprecedented, that it becomes a subject of animadversion.

The Boorns and Colvin were in the humblest circumstances. Their families were to be supported by hard labour. They were men, evidently of very ordinary capacities, and had but little of that sensibility which results from education, and refined society. The family of Colvin was increasing as his means of sustaining them were diminishing. Occasionally he was affected by the greatest calamity which can befall an human being—mental derangement. Although a brother in law to the Boorns, he hung like a dead weight upon them and their father. Those kind of bickerings, altercations and strifes which almost invariably take place in low life and which are increased by the prospect of want, were frequent amongst them. The miserable Colvin, with a shattered intellect, fled from a scene which tortured his imagination and increased the malady of his mind. Years rolled away, and Colvin "*was not*." The remembrance of the unkind treatment which had been bestowed upon him by the Boorns, undoubtedly disturbed their tranquillity, and drew from them occasional expressions of compunction. These expressions were remembered by the neighbours, who undoubtedly *wondered* what had become of *poor Russell Colvin*.

This subject occupied the attention of almost every mind in the neighbourhood. It seems as if the age of *ghosts* and *hobgoblins* had revived; and that every house was haunted by the *ghost of Colvin*. At length the *murdered* Colvin *actually* appeared to a connection of the Boorns, and declared that he *had* been murdered by the Boorns, and pointed out the place where he *was* buried. Upon this miraculous revelation, all the human passions were called into operation.—An old deserted potatoe-hole was explored, and bones were found amongst its rubbish! "The north gave up and the South kept not back!" Every body rushed forth to behold *the bones of Colvin*!

The valleys poured forth groups of wondering men and women, not a few; the mountaineers descended from the rugged sides of the mountain to gaze, with trembling awe and quivering solicitude upon—the *bones of Colvin!* Timid females, and *men* who think and act like timid females, undoubtedly from the effects of disturbed imagination, saw the ghost of Colvin flitting across the declivities of the mountain, or walking with solemn step around the fields. All, all was consternation! Every mouth was ready to exclaim, *murder! murder!*

The previous quarrels of Stephen and Jesse Boorn with the *murdered Colvin*—their accidental expressions in regard to him, and most especially a declaration to *Sall*, (as they called Mrs. Colvin) that she might "*swear a child*," with which she was pregnant, *because Colvin was dead*, all conspired to fix suspicion upon the unfortunate Stephen and Jesse. The unsuspecting Boorns were pursuing their humble callings in life—the one in the State of New-York, the other in Vermont, two hundred miles apart. Suddenly the powerful and resistless arm of vindictive justice was raised over their devoted heads.

They were loaded with irons—immured in a dungeon—and were deprived even of the miserable consolation of communing with each other in their calamities—for they were chained in separate cells. Even *innocence* could hardly sustain the mind under such an accumulation of woes. At first, they persisted in declaring their total ignorance of the crime alleged against them, and affirming their innocence. But their minds, naturally feeble, and rendered distracted at the prospect of death, began to waver. They found an unconquerable prejudice against them in the minds of the people; and they scarcely heard an human voice but what uttered forth the language of crimination. But there was no evidence of their guilt—and had they not been alarmed by denunciations, or allured by false hopes, they never *could* have been brought to make the most extraordinary **CONFESSIONS**, which stand recorded in the melancholy records of criminal law. Upon these confessions they were condemned to die, and Stephen Boorn at this time, (January 28th) would have been suspended between the heavens and the earth, and his agonized brother clanking his chains in a dungeon, had they not been rescued by the appearance of the **LIVING COLVIN**. That the public mind should, if possible be satisfied as to the guilt of an human being who suffers death, the practice of endeavoring to obtain a confession of the criminal **AFTER** he is condemned, is excusable; but by exciting fears or raising hopes in the minds of a man **BEFORE** he is tried, and thereby obtaining **CONFESSIONS** against *himself* is making him his own executioner—is making him **FELO DE SE**.

This subject might be extended much farther; but it may already have been extended too far. But the writer most unequivocally avers that he is far from wishing to implicate any human being engaged in this melancholy transaction.—It is *principle* for which he contends, without the remotest wish to affect, or injure any man.

An examination of all the principal facts yet disclosed has induced the writer to remark, perhaps with more freedom than caution, upon the measures resorted to, to obtain CONFESSIONS from the Boorns' of their own guilt. To prove their accuracy the following extracts of a letter from one of the examining magistrates, is here introduced.

"Much was said to Jesse, to get the facts from him: he was told that if he should confess the facts, it would probably be the means of clearing him. Jesse at length confessed that Stephen told him, that he (Stephen) gave Russel a blow, and laid him aside, where no one would find him. Upon this we sent for Stephen, who was brought here. Jesse now said that his former confession was not true: but nothing could now convince the people that Colvin was not murdered."

"During their commitment, much exertion was made to get a confession from them. Stephen wrote a statement of what he said were facts; in which he acknowledged he killed Colvin, deposited him in the place where the knife and button were found, and that he took the bones from that place and put them under his father's barn, which was soon after burnt, and the body principally consumed."

"It appeared in evidence, that several had promised to sign for their pardon, if they would confess; at the same time telling them that there was no doubt they would be convicted upon the testimony that was then against them."

"A person in jail with them for perjury, testified to a full confession of the murder, made to him by Stephen and Jesse; and it was so artfully framed, so corroborated by other facts, that it had great weight with the court and jury, though it appears now to have been wholly false. But he has his end answered; he has got bail by the means, and gone off."

The reader ought to be apprised that the following "Brief Sketch," is not offered as a "Report" of the Trial of Stephen and Jesse Boorn, for the murder of Russell Colvin—it is merely a summary of the multifarious mass of evidence exhibited upon that singular prosecution; and is designed to corroborate the facts stated in the Narrative and Sermon of the Rev. Mr. HAYNES, and the preceding remarks of the writer. As they are published together, it is hoped, and it is believed that the reader will find in this publication a candid, dispassionate and authentic view of this unprecedented transaction. It is said that a full Report of this trial is about to be published under the sanction of the Supreme Court of Vermont. It will become a leading case before the Courts and Juries of our country. The termination of it may be productive of a double effect—it may be productive of good, so far as it may restrain those who sit in judgment upon the lives of their fellow-men, from pronouncing the awful sentence of death, until guilt is rendered indubitable—

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it may produce evil, as it may prevent the infliction of punishment where there ought to be no doubt of guilt. It is most sincerely hoped it may occasion a total discontinuance of the highly reprehensible practice of encouraging prisoners from raising their hopes, or alarming them by exciting their fears, to make CONFESSIONS against themselves. "No man is bound to criminate himself," is a maxim handed down from the best periods of Roman and English Jurisprudence. It is this principle that has banished the torture and the rack from most portions of the civilized world.

STATE OF VERMONT.

Supreme Court, Adjourned Term, November, 1819.

Present—HON. DUDLEY CHASE, Ch. Just.

HON. JOEL DOOLITTLE, Ast. Judge.

A Bill of Indictment for Murder was found by a grand-jury at the September Term of the Supreme Court against Stephen Boorn and Jesse Boorn for the murder of Russell Colvin; but as the Court did not consist of the requisite number of judges, the trial was adjourned.

The indictment was in the usual form, charging the prisoners as "being moved and seduced by the instigation of the devil,"—and that they "feloniously, wilfully, and of their malice aforethought did kill and murder," Russell Colvin, upon the 10th day of May, A. D. 1812.

The State's Attorney appeared in support of the prosecution.

Messrs. Skinner, Wellman and Sargeant, as counsel for the Prisoners.

Before the introduction of any testimony, Mr. Skinner made a motion, that as the prisoners had pleaded severally "Not Guilty," they might be allowed separate trials.

The court ruled that Stephen and Jesse Boorn, should be *jointly* tried for the murder of Russell Colvin.

About fifty witnesses were successively examined; but as they were only corroborative of each other—all tending to prove the leading facts in the case, and too voluminous for this Brief Sketch, none but the principal testimony will here be introduced.

EVIDENCE ON THE PART OF THE STATE.

Thomas Johnson, sworn—I was a neighbour to the Boorns and Colvin. In the early part of the month of May, seven years ago, last spring, I saw one morning, Stephen Boorn, Jesse Boorn, Russell Colvin, and his son Lewis Colvin, picking up stones. They appeared to be in a quarrel. I had a full view of them, although they could not see me. I have never seen Russell Colvin since. Stephen said he was not in the field picking stones at the time

Russel went off, but that he went off at that time. Jesse, while in imprisonment, told me that he was assisting in shoeing an horse, when Russell went off. Stephen said the woodchuck they had for dinner the day Russell went off was killed by him, when mending fence for a Mr. Hammond. Having purchased the land where this quarrel took place, the children found and brought home an old mouldy rotten hat—I knew it to be the hat of Russell Colvin. In the cellar-hole stood a thrifty apple tree about three feet high, which was taken away the season after I noticed it.

Lewis Colvin (son of Russel Colvin) sworn. He said that at the time Russell went off, he was picking stones with him, and Stephen and Jesse Boorn—that a quarrel arose between Stephen and Russell—that Russell struck Stephen first—that Stephen knocked Russell down with a club, and that he (the witness) ran away, and saw no blood—that Stephen told him not to tell that he struck Russell—that he has never seen Russell since.

[It appeared from the testimony of many witnesses that a jack-knife and a button was found in the old cellar-hole which were recognized as having once belonged to Russell Colvin—that he had occasionally absented himself from his family, and was at times in a state of mental derangement—that bones had been found, which by some were supposed to be human bones, but which appeared, from the most conclusive evidence, not to be human bones. From a large mass of evidence, that which relates to the accidental observations of the Boorns, before their arrest and imprisonment, and their confessions when chained in a dungeon, are deemed altogether the most important.)

Truman Hill, sworn—He stated that he had the keys of the prison in which the Boorns' were imprisoned—that he exhorted Jesse to tell the truth, and that if he told a falsehood it would increase his trouble—that he confessed that he was afraid that Stephen had murdered Colvin, and that he believed he knew very near where the body was buried—that when the knife and the hat of Colvin were shown him, he was much agitated. He said he urged Jesse to confess nothing but the truth.

Sally Colvin (wife of Russel Colvin, and sister to the Boorns') stated that about four years since Stephen said I could swear the child with which I was pregnant, for he knew that Colvin was dead. Jesse also said that I could swear it.

Daniel D. Baldwin, and Mrs. Baldwin to the same effect said that about three years since, Stephen told them that Colvin went off in a strange manner into the woods at the time he, Jesse, Colvin and Lewis were picking stones—that Lewis had gone for drink, and when he asked them where Colvin was gone? one answered, gone to hell; the other that they had put him where potatoes would not freeze.

[Numerous witnesses testified to the contradictory declarations of the Boorns in regard to the disappearance or death of Colvin; but the testimony of Silas Merrill, to the extraordinary CONFESSION of Jesse Boorn is *in substance* inserted.]

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Silas Merrill, sworn. Testified that as Jesse was returned to prison from time to time from the court of enquiry, that he had been urged to confess; that one night in the prison we got up, and Jesse said that Stephen knocked Colvin down twice, broke his skull, and the blood gushed out; that his father came up there several times, and asked if he was dead, and said, damn him; that all three of us took the body and put it into the old cellar, where father cut his throat; that he knew the jack-knife to be Colvins; that Stephen wore Colvin's shoes; that about a year and an half after, they took up the bones; put them under a barn that was burned; then pounded them up and flung them into the river; that father put some of them into a stump, etc.

[The following written confession of Stephen, was rejected by the Court, but as its contents were alluded to by oral testimony, it was introduced by the prisoners counsel.]

"May the tenth, 1812, I, about 9 or 10 o'clock, went down to David Glazier's bridge, and fished down below uncle Nathaniel Boorn's, and then went up across their farms, where Russell and Lewis was, being the highest way, and sat down and began to talk, and Russel told me how many dollars benefit he had been to father, and I told him he was a damned fool, and he was mad and jumped up, and we sat close together, and I told him to set down, you little tory, and there was a piece of a beech limb about two feet long, and he caught it up and struck at my head as I sat down, and I jumped up and it struck me on one shoulder, and I caught it out of his hand and struck him a back-handed blow, I being on the north side of him, and there was a knot on it about one inch long. As I struck him I did think I hit him on his back, and he stooped down and that knot was broken off sharp, and it hit him on the back of the neck, close in his hair, and it went in about half of an inch on that great cord, and he fell down, and then I told the boy to go down and come up with his uncle John, and he asked me if I had killed Russell, and I told him no, but he must not tell that we struck one another. And I told him, when he got away down, Russell was gone away, and I went back and he was dead, and then I went and took him and put him in the corner of the fence by the cellar hole, and put briars over him and went home and went down to the barn and got some boards, and when it was dark I went down and took a hoe and boards, and dug a grave as well as I could, and took out of his pocket a little barlow knife, with about a half of a blade, and cut some bushes and put on his face and the boards, and put in the grave, and put him in four boards on the bottom and on the top, and t'other two on the sides, and then covered him up and went home crying along, but I want afraid as I know on. And when I lived to William Boorn's I planted some potatoes, and when I dug them I went there and something I thought had been there, and I took up his bones and put them in a basket, and took the boards and put on my potatoe hole, and then it was night, took

the basket and my hoe and went down and pulled a plank in the stable floor, and then dug a hole, and then covered him up, and went in the house and told them I had done with the basket and took back the shovel, and covered up my potatoes that evening, and then when I lived under the west mountain, Lewis came and told me that father's barn was burnt up, the next day or the next day but one I came down and went to the barn and there was a few bones, and when they was to dinner I told them I did not want my dinner, and went and took them, and there want only a few of the biggest of the bones, and throwed them in the river above Wyman's, and then went back, and it was done quick too, and then was hungry by that time, and then went home, and the next Sunday I came down after money to pay the boot that I gave to boot between oxens, and went out there and scraped up them little things that was under the stump there, and told them I was going to fishing, and went, and there was a hole, and I dropped them in and kicked over the stuff, and that is the first any body knew it, either friends or foes, even my wife. All these I acknowledge before the world.

STEPHEN BOORN.

Manchester, Aug. 27, 1819.

Much other testimony was adduced, but cannot be introduced into this, which is again pronounced a mere "Sketch" of this singular prosecution.

The charge of the court to the jury was solemn, learned, and peculiarly impressive.

The Jury returned with a verdict finding both of the prisoners GUILTY.

They were sentenced to be executed on the 28th of January, 1820.

WAIT et al. v. STATE.

113 Ky. 321—24 Ky. Law Rep. 604—69 S. W. Rep. 697.

Decided September 18, 1902.

CONSPIRACY—MERGER: *Conspiracy to commit a felony does not merge into the completed offense—Admissibility of evidence.*

1. Under Cr. Code Prac. §§ 262-265, relating to offenses of differing degree, and providing, among other things, that "if the proof show the defendant to be guilty of a higher degree of the offense than is charged in the indictment, the jury shall find him guilty of the degree charged in the indictment," defendant was properly convicted of the offense of conspiracy to defraud under an indict-

ment charging that offense, though the offense thus charged is a misdemeanor, and the facts alleged showed that the acts done pursuant to the conspiracy amounted to a felony.

2. The general statement in the instruction to the jury that a conspiracy may be proved by testimony that it was actually entered into, or may be "inferred" by the jury from the facts and circumstances in evidence, was not prejudicial to defendant, as the jury was, in effect, directed by the subsequent part of the instruction that it must believe beyond a reasonable doubt, from the facts and circumstances in evidence, that a conspiracy existed.
3. As defendants undertook, for a stipulated sum, to run the bank they were charged with conspiring to defraud, and to keep the books, testimony as to entries in the individual ledger kept by clerks under their control was admissible to show their fraudulent intent.

Court of Appeals of Kentucky.

Appeal from Circuit Court, Pulaski County.

G. W. Wait and R. G. Hall, convicted of conspiracy to defraud, appeal. Affirmed.

Denton & Robinson, Curd & Smith, W. A. Morrow and V. P. Smith, for the appellants.

J. N. Sharp, for the Commonwealth.

Du RELLE, J. The appellants, G. W. Wait and R. G. Hall, were indicted jointly with Cy Wait and L. E. Hunt for conspiracy to defraud the Somerset Banking Company and others and the public generally.

The principal ground urged for reversal of the judgment of conviction is that the indictment not only charges the conspiracy to defraud, and sets out the method by which it was to be accomplished, but also sets out overt acts in furtherance of the object of the conspiracy, and that the facts thus alleged show the object of the conspiracy to have been the embezzlement of more than \$40,000 from the banking company, of which appellants were president and cashier, and that this object was fully accomplished. It is therefore claimed that as conspiracy is a misdemeanor and embezzlement a felony, and as the facts constituting the felony have not only been alleged in the indictment, but proved, there can be no conviction for the misdemeanor, because it is merged in the felony. The principal authority in support of this contention is the case of *Com. v. Blackburn*, 1 Duv. 4, in which this exact contention was made

and sustained in an opinion by Judge Williams, holding that an indictment charging a conspiracy to commit treason, and alleging overt acts which showed the conspiracy was consummated by the commission of the felony, was bad on demurrer. That opinion, rendered in 1863, in a case growing out of the events of the Civil War, merely states the rule to be that if a conspiracy "should be consummated by the commission of the felony, it would merge in the higher crime;" and relies solely upon the case of *Com. v. Kingsbury*, 5 Mass. 108. The Massachusetts case, which was a case of indictment for conspiracy to commit larceny, which shows a felony was committed, refers to no authority. It seems to be, however, the leading case in the United States in support of this doctrine, except where, as in Arkansas, the question is settled by statute. *Elsley v. State*, 47 Ark. 572, 2 S. W. 337. The doctrine as laid down in the *Blackburn* and *Kingsbury* cases proceeds upon the theory that the act of conspiracy is the same act as that by which the conspiracy is consummated; to which doubtful theory is applied the common-law doctrine that the same act cannot be both felony and misdemeanor, and that where a misdemeanor was raised to the grade of felony it became more heavily punishable, and thereby ceased to be a misdemeanor. At the common law, a person under indictment for a mere misdemeanor had the privilege of full defense by counsel, the right to a copy of the indictment, and a special jury, not permitted in felony; and this difference in procedure, together with the distinction in the punishments, and the real or supposed difference in the enormity of the offenses, constituted the reason for the rule. 1 Bish. New Cr. Law, § 804, § 805. The distinction between felony and misdemeanor having been largely abrogated by statutory provisions in the various States, it has been held in some States that, as the reason failed, the law ceased to operate. But without reference to statutory provisions, the better doctrine and the weight of authority and reason seem to be against the application of the rule to cases of conspiracy. Says Mr. Bishop (1 New Cr. Law, § 792): "Where the indictment is for a conspiracy to commit an offense, and the proofs establish that the conspirators actually committed it; or for manslaughter, and murder is shown; or for larceny, and it was perpetrated in the course of a burglary or a robbery, * * * in these and the like cases the defendant may be convicted of what is

charged against him, if, like what is not charged, it is sustained by the evidence." And, though the same criminal thing which is a felony cannot also be a misdemeanor, "yet, if to what constitutes a misdemeanor something is added, the combination may be a felony; in which case, according to Hawkins, if the indictment is for misdemeanor, and the added act which makes the felony appears at the trial, opinions are divided as to whether or not there can be a conviction for the misdemeanor. His decision is that there can be, and there is great weight in the reason, namely, 'because the king may proceed against the offender as he sees fit, either as a trespasser or a felon.' This therefore, may be deemed the better doctrine." 1 Bish. New Cr. Law, § 812. Mr. Bishop, in this section, deplores the American cases which follow the *Kingsbury Case*, and quotes approvingly from Lord Denham in *Reg. v. Dutton*, 11 Q. B. 929: "The felony may be pretended to extinguish the misdemeanor, and then may be shown to be but a false pretense; and entire immunity has sometimes been obtained by varying the description of the offense, according to the prisoner's interest. He has been liberated on both charges, solely because he was guilty upon both." And in direct reference to the *Kingsbury Case*, and the cases following, including the *Blackburn Case*, Mr. Bishop says: "A conspiracy to commit a felony is a step toward the consummation, but it is only misdemeanor. There are American cases which seem to hold that if parties on trial for such a conspiracy are shown to have proceeded in it to the accomplished felony, the misdemeanor is merged, and they cannot be convicted—a rule, the authorities agree, not applicable where the object of the conspiracy is a misdemeanor. This doctrine, the reader perceives, is contrary to just principles. It has been rejected in England, and, though there may be States in which it is binding on the courts, it is not to be deemed general American law." Again, in section 815, sub-sec. 3: "The general principle, both of natural justice and of law, permits the prosecuting power to bring an offender to trial for so much of his offending as it pleases. And if its pleasure is to overlook a felony, even though it was the instrument by which a misdemeanor was accomplished, the clemency, according to the ordinary course of legal things, and, it would appear, according also to the dictates of the mere uneducated reason, is

not a wrong to its recipient whereof he can complain. Though the opposite doctrine is not altogether without support in reason, it is believed that the foundation of reason for this one is, on the whole, the broader and firmer." See, also, *Com. v. Dean*, 109 Mass. 349, which seems in principle to conflict with the *Kingsbury Case*; *State v. Setler*, 57 Conn. 467, 18 Atl. 782, 14 Am. St. Rep. 121, approving the doctrine laid down in *Reg. v. Dutton*, *supra*, and *Reg. v. Neale*, 1 Denison, Cr. Cas. 37. Curiously enough, in the *Blackburn Case*, no reference is made to the statutory provisions as to offenses of differing degree (Cr. Code Prac. §§262-265), which are considered in *Usher v. Com.*, 2 Duv. 394, in the opinion by Chief Justice Marshall. The omission is the more striking because in the *Blackburn Case* the conspiracy seems to be treated as a step in the commission of the felony. Section 264 provides: "If an offense be charged in an indictment to have been committed with particular circumstances as to time, place, person, property, value, motive, or intention, the offense without the circumstances, or with part only, is included in the offense, although that charged may be a felony, and the offense, without circumstances, a misdemeanor only." Section 265 provides: "If the proof show the defendant to be guilty of a higher degree of the offense than is charged in the indictment, the jury shall find him guilty of the degree charged in the indictment." Under section 262 *et seq.* it has been held that under an indictment for the felony of striking with a deadly weapon with intent to kill, conviction could be had for assault and battery. *Com. v. Duncan*, 91 Ky. 592, 13 Ky. Law Rep. 162, 16 S. W. 530. And in *Com. v. Bright*, 78 Ky. 238, a conviction of breach of the peace was held a bar to an indictment for the felony of maliciously striking and wounding with a deadly weapon. Said the court in the opinion by Judge Hargis: "It is urged that the charge contained in the indictment constitutes a felony, and that the breach of the peace is merged in it. It may be admitted that the indictment charges a felony, but there is no merger, because the law is 'thus written' in the sections of the Code quoted." The opinion in the *Bright Case*, directly construing the Code provisions, is in conflict with the decision in the *Blackburn Case*, in which those provisions were not considered, and must be considered to overrule the earlier case. In the present case, the appellants cannot be heard to complain that they were con-

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victed of a misdemeanor only, and deprived of a trial for a felony.

The other questions raised on this appeal may be briefly disposed of. The principal objection is to the instruction given by the court. The instruction given seems to us to cover the ground attempted to be covered by the instructions offered on behalf of the defense, and, taken as a whole, to do so correctly. It begins with the definition of a conspiracy, and a statement in general terms of the elements of fraud. It then proceeds to state what is necessary to be believed by the jury in order to convict the defendants on trial. To this part of the instruction no objections seem to be made. In the general statement or preamble it is stated that "a conspiracy may be proved by testimony that it was actually entered into, or it may be inferred by the jury from the facts and circumstances in evidence;" and the use of the word "inferred" is objected to. But the instruction proceeds: "Provided, in either state of case, that the jury believe beyond a reasonable doubt that it existed." This, in effect, was a direction to the jury that they must believe beyond a reasonable doubt, from direct testimony, that a conspiracy was actually entered into, or from the facts and circumstances in evidence that a conspiracy existed. And in the second part of the instruction they are again required to "believe from the evidence beyond a reasonable doubt that in Pulaski County, within twelve months before the finding of the indictment, the defendants, * * * or any two or more of them, conspired or agreed with each other to prejudice and defraud the Somerset Banking Company of its money," etc. Whether the statement in the preamble was necessary or not, we are unable to see how it could have prejudiced the defense.

The testimony as to the entries in the individual ledger was properly admitted, in view of the contract shown, by which these two defendants, for a stipulated sum, undertook to run the bank and keep the books. That book was under their control, kept by clerks who were under their control. The manner in which they had it kept was admissible as evidence, in connection with the other circumstances shown in the case, tending to show their guilty knowledge and fraudulent intent.

For the reasons given, the judgment is affirmed.

Petition for rehearing by appellants overruled.

NOTES (By J. F. G.)—*The doctrine of merger as applied to conspiracy:—*

The general rule as announced in comparatively late cases is:—that a conspiracy to commit a felony merges into the felony, but that a conspiracy to commit a misdemeanor does not. One reason assigned for this rule is, that misdemeanors, as is illogically contended, being equal to each other, one cannot merge in another. These courts seem to overlook the fact that misdemeanors form a class of crimes less than felonies, and instead of being equal to each other, are of wide divergence as to magnitude. One misdemeanor may be an essential ingredient of a greater misdemeanor; thus, an assault is an essential element of each assault and battery, or of assault with intent to commit a bodily injury; also an attempt to commit a misdemeanor, while it may in itself be a crime, it is but an essential part of the crime attempted, and merges, if the attempt is successful.

Another reason assigned for this fallacious doctrine is, that the gist of the offense is in the combination, and that therefore the consummated act, if the statutory penalty is slight, may be ignored, and a more severe punishment administered for the conspiracy.

Whatever may be the rule in monarchical countries, this reason should not receive recognition in a free country; otherwise, the shadow of crime would rest upon the graves of the patriots who fell while defending the crest of Bunker Hill. In a free country the right of individuals to combine and confederate is the tap-root of the tree of liberty. With us a combination is only illegal when employed for an illegal purpose. It obtains its virus from the contemplated illegal purpose, and can possess no more than the fountain can supply. In fact it has less; for yet an illegal act is necessary to consummate the contemplated crime, and this added makes the total supply.

When the legislature prescribes a punishment for the illegal act, certainly there is no power or justice in administering as severe or more severe punishment, simply for a step toward a prohibited act. On this phase of the subject, the Supreme Court of Pennsylvania has rendered two very sound opinions.

In *Scott v. Commonwealth*, 6 Sergent & Rawle 225, decided in 1820, the court said:

"It can never be maintained, that an attempt to commit an offense should be punished with greater severity than if actually perpetrated; it is contrary to the genius of our laws, to the just proportion of which it has been the endeavor of the legislature always to maintain between criminals and their punishment."

In *Hartman v. Commonwealth*, 5 Pa. St. 60, decided in 1846, the court said:

"But the sentence is palpably erroneous. The principal of *Scott v. The Commonwealth*, 6 Serg. & Rawle, 224, in which it was held that an assault with intent to kill cannot be more severely punished than would have been the offense attempted, rules the point.

In that case, my late brother Duncan said, with entire approbation of the chief justice and myself, that an attempt to commit an offense shall never be punished more severely than the perpetration of it. A conspiracy is even less than an attempt; and it was an error to impose on it a greater punishment than the statute had annexed to the offense itself."

In Chicago in 1905 a victim of a serious assault, a few days after the assault, died of pneumonia. Several persons were then indicted for murder, and also for conspiracy to assault with intent to inflict a bodily injury. On the latter indictment a trial was had. The indictment contained a count for conspiracy to injure more than one person; but that count was quashed; so the indictment stood as one for conspiracy to assault, etc., but one person. A conviction was had, and one of the defendants was sentenced to a term in the penitentiary under the Indeterminate Sentence Statute, and to pay a fine of \$2,000, which was in effect the maximum punishment for conspiracy to commit a crime. The case was heard before the Appellate Court, on writ of error, the accused citing the case of *Commonwealth v. Hartman, supra.*; but the court held that the conspiracy was the gist of the offence, and affirmed the conviction. (132 Ill. App. 109.) Had the conviction been on the count charging a conspiracy to injure more than one the decision might seem more logical; but the conviction was for a conspiracy to assault but one person, and the penalty imposed greater than that prescribed for the completed offense. A glance at the statutes of Illinois places this decision in a peculiar light.

The penalties prescribed for the offenses bearing on this decision are as follows:—For conspiracy to commit a crime, imprisonment not exceeding five years in the penitentiary, or a fine not exceeding \$2,000, or both;—for assault with a deadly weapon with intent to inflict a bodily injury, by not more than one year in jail, or by a fine of not less than \$25.00 nor more than \$1,000 or both such fine and imprisonment;—for assault, by a fine not less than \$3 nor more than \$100. (From the opinion it would seem that even the contemplated crime was simply an assault, without the use of a deadly weapon.)

If conspiracy to commit an assault should be followed with a sentence of five years in the penitentiary and a \$2,000 fine, what punishment would be adequate for a conspiracy to commit murder? To make the penalties proportionate, should not the penalty for a conspiracy to commit murder be more severe than death? Why not revive the old punishment for treason:—that the convict be dragged to the place of execution, hung until half dead, then cut down, his bowels burnt in his presence, his private parts severed, his head cut off, his body quartered and displayed to the public gaze.

When the Legislature of any State prescribes punishment with a maximum and a minimum, for conspiracy to commit crime, the

maximum being much less than that prescribed for the greatest contemplated offense, it is to be presumed that the Legislature intended the penalty to be correspondingly less than that for the contemplated offense.

Another reason why a conspiracy to commit a crime merges in the completed act, is, that no man shall be punished twice for the same offense, which principle would be ignored, if a man can be tried and convicted separately for both the conspiracy and the completed act. Criminal laws should be certain and not the subjects of double construction. When a legislature prescribes a punishment for a criminal act, it is presumed that the legislature intended that penalty to cover the offense and all of its constituent parts:—intended the penalty to be fixed and certain, and not left to the discretion of the Prosecuting Attorney, to frame his action to suit some peculiar personal whim, or to gratify the malice of a private prosecutor.

However, the trend of late decisions, coursing through the rut of error, seems to be, that a conspiracy to commit a misdemeanor does not merge into the completed misdemeanor. This delusive doctrine of phantom logic, based on a fallacy, with an *ignis fatuus* for a precedent, has led courts into the quagmires of uncertainty and confusion until the Court of Appeals of Kentucky, holds, that the lesser cannot merge into the greater, of which it forms an essential constituent part.

The case of *Commonwealth v. Kingsbury*, decided at an early day by an able court, to us seems to announce the correct doctrine. We close these notes by a reproduction of it:—

COMMONWEALTH V. KINGSBURY ET. AL.

Supreme Judicial Court of Massachusetts—March Term, 1809.

5 Mass. 106

(The following is an exact copy of the official report of the case.—J. F. G.)

When a felony or misdemeanor is in fact committed, a conspiracy to commit such felony or misdemeanor cannot be indicted and punished as a distinct offense.

The indictment charged that *Fisher Kingsbury, Jonathan Kingsbury, Daniel Kingsbury, and Fisher Kingsbury, jun.* being evil disposed persons, and contriving and intending to injure one *Thomas Pons*, and acquire property from him under false pretences, without paying for the same, at, etc., on, etc., with force and arms, did fraudulently and unlawfully conspire, combine, confederate and agree together to obtain the possession of ten sets of carriage harnesses of the said *Pons* of the value of five hundred dollars, in the shop of the said *Pons* then and there being, under color of authority from the said *Pons* to said *Daniel and Fisher, jun.* to sell the same,

and under the pretence of a sale from the said *Daniel* and *Fisher*, jun. to the said *Jonathan*; and after so obtaining possession of the said harnesses, to remove the same from the shop of the said *Pons* in *Boston* to the dwelling house of the said *Fisher* in *Canton*, and there to secure the same, with intent to defraud the said *Pons* of the value thereof; and in pursuance of the said unlawful and fraudulent conspiracy, combination, confederacy and agreement, they, the said *Fisher*, *Daniel*, *Jonathan*, and *Fisher*, jun. there afterwards on the same day did with like force and arms obtain the possession of the said harnesses, under color of such authority from said *Pons* to said *Daniel* and *Fisher*, jun., to sell the same, and under the pretence of sale thereof by said *Daniel* and *Fisher*, jun., to said *Jonathan*, and did then and there remove and secrete the same, with intent so as aforesaid to defraud the said *Pons* of the value thereof, to the great injury of the said *Pons*, etc.

Fisher Kingsbury, the elder, being arraigned upon the indictment and pleading not guilty, was tried before the *Chief Justice*, and being convicted, moved in arrest of judgment, because the offense charged amounts to a larceny, which being a felony, the conspiracy charge is merged.

Parker, in support of the motion, cited *Rex. vs. Sharpless et al.* 1 *Leach*, 108—*Rex vs. Charlewood*, *ibid.* 456—*Rex vs. Doran*, 2 *Leach*, 608, 6 *Mod.* 77—*Hob.* 138.

Bidwell, Attorney-General, did not deny that the facts set forth in the indictment would have supported a charge of larceny; but he said they were not included in the conspiracy, which is the offense charged, and are only mentioned as an aggravation of the conspiracy, which was previously complete, and thence he contended was not merged in the larceny afterwards committed.

The opinion of the Court was afterwards delivered to the following effect by

PARSONS, C. J. The defendants are charged with conspiring to get possession on the chattels of *Thomas Pons*, then in his shop, to remove them from his shop, and to conceal them from him, under color of authority from the owner to sell them, and that they in fact carried their conspiracy into execution.

The fraudulently obtaining possession of the chattels of *Pons*, carrying them away, and secreting them, is unquestionably a felony; and the Attorney General very properly admits it. But he has argued that the conspiracy was a complete offense by itself before it was carried into effect, and therefore is not merged in the felony.

We have considered this case, and are of the opinion that the misdemeanor is merged. Had the conspiracy not been effected, it might have been punished as a distinct offense; but a contrivance to commit a felony, and executing the contrivance, cannot be punished as an offense distinct from the felony, because the contrivance is a part of the felony, when committed pursuant to it.

The law is the same respecting misdemeanors. an intent to commit a misdemeanor, manifestly by some overt act, is a misdemeanor; but if the intent be carried into execution, the offender can be punished but for one offense.

If the jury had acquitted the defendant of executing the conspiracy only, sentence might have been passed against him for the misdemeanor, because the offense is not laid to be done feloniously. But they have found him guilty of acts, which, without doubt, amount to a felony.

Judgment must be arrested.

SUB-NOTE.—Since the above has been set in type, Judge Freeman, while presiding in the Criminal Court of Cook County, quashed an indictment which charged a conspiracy to *assault and beat*. The judge said that he did not believe it was the intention of the Legislature that the severe penalties of the Conspiracy Statute should be administered for conspiracies to commit ordinary assaults. In support of his opinion he cited *Maloney v. People*, 229 Ill. 593, 82 N. E. Rep. 389. This latter case will probably find place in the next volume of the American Criminal Reports.

PEOPLE V. GILMAN.

121 Mich. 187—80 Am. St. R. 490—46 L. R. A. 218.

Decided September 12, 1899.

CONSPIRACY—PLEADING—SPIRITUALISTIC SEANCE: *Conspiracy to obtain money through spiritualistic seance—Information charging conspiracy against one: proof of conspiracy to defraud any one.*

1. To combine and agree to obtain money by giving fraudulent spiritualistic seance, which would deceive only the unwary, by acting on their religious sentiments, is a conspiracy to defraud.
2. An information charging a conspiracy to defraud a certain person is sustained by a proof of a conspiracy to defraud the public generally.
3. A conspiracy is complete when formed. Guilt does not depend upon its success.

Supreme Court of Michigan.

Error to Recorder's Court of Detroit; Hon. William W. Chapin, Judge.

E. Medford Gilman, convicted of conspiracy, appeals. Affirmed.

E. J. Jeffries, for the appellant.

Allan H. Frazer, Prosecuting Attorney, and *Ormond F. Hunt*, Assistant Prosecuting Attorney, for the People.

HOOKEE, J. The defendant was convicted of the offense of conspiring with others to cheat and defraud one Edwin H. Sadler of the sum of one dollar. The proof showed that the defendant professed to be a materializing medium, and gave "materializing seances," in which he was assisted by others mentioned in the proof. Sadler was a detective, and attended with another detective. Before the proceeding began, defendant said that the usual collection of one dollar would be taken up, and Sadler, among others, paid a dollar. During the proceedings Sadler succeeded in exposing the defendant as an impostor.

Counsel for the defendant say that there are two grounds of error relied on:

(1) The information does not meet the theory of the evidence, because it is obvious that any conspiracy to defraud that may have existed was not to defraud Sadler, but the general public, and should have been so charged.

(2) That no crime was committed, because it was an obvious humbug, which could not, in the nature of things, deceive any rational being.

It is apparent that the conspiracy to cheat was not specially aimed at Sadler when the scheme was concocted, but at such persons as might be induced to attend the meetings. It may be that no particular persons were in view, and, had no one attended the meeting, no one could have been named as an intended victim, although the offense of conspiracy would have been complete. An indictment in such case might charge a conspiracy to cheat "the citizens or inhabitants of the State and others," as in the case of *Clary v. Com.*, 4 Pa. St. 210; or "such persons as should become purchasers" (*Com. v. Judd*, 2 Mass. 329). But where the conspiracy has been carried out, and money has been obtained from some person in consequence of it, the overt act has shown and made certain what was uncertain before, viz., the person whom it was the conspirator's intention to defraud. See *People v. Arnold*, 46 Mich. 273, 9 N. W. 406.

Counsel cite the case of *U. S. v. Fay*, 83 Fed. 839, in

support of the second point. In that case Howard paid the defendant \$50 upon the pretense that through supernatural power of mental vision possessed by him he could and would find, and inform him, Howard, of hidden treasures upon his farm. The defendant was arrested upon the charge of using the United States mail for "a scheme to defraud." Upon motion, the court quashed the information upon the ground that

"Such a scheme manifestly must involve something in the nature of a plausible device—some such device as in itself is reasonably adapted to deceive persons of ordinary comprehension and prudence. A manifest hoax and humbug, like a proposition to take a person on a flying trip to the moon, to fit out a traveler for a submarine voyage to China, or any other scheme which belies the generally known and generally recognized laws of nature, cannot, in the nature of things, deceive any rational being. * * * There is a marked distinction between a case of this kind, involving, as it does, a physical impossibility, and one related to religious, moral, or ethical tenets. A scheme to defraud, planting itself upon, and seeking to take advantage of, such tenets, entertained as they are by large numbers of people, has been held within the contemplation of the Federal statutes, and with this class of cases I have no fault to find. * * * Because there is no scheme set out in the indictment reasonably adapted to deceive persons of ordinary prudence, I am of the opinion that there is no scheme to defraud, within the meaning of the statute in question."

We are not disposed to criticise this construction of a statute that is not before us, but we are of the opinion that it should not be said as a matter of law that a citizen is not a rational being, even if he be entrapped by cheats and false pretenses which would not deceive persons of ordinary intelligence. The law is more necessary to the protection of the unwary and simple-minded, who are not looking for duplicity and deceit, than shrewder persons. Deceiving persons do not ply their nefarious vocations among the latter class, but seek for victims among those whose credulity makes them more easily deceived. We cannot agree with counsel in considering those who believe in the theories of spiritualism to be idiots, and, if we could, we should hesitate to say that one who conspired to cheat them would not be guilty of a crime. It is said that the information charges a conspiracy to defraud one who could not be defrauded, be-

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cause he knew the representations to be false. The conspiracy is complete when it is formed, and the guilt or innocence of the conspirators does not depend upon the success of the enterprise. They carried out their scheme, and obtained money from Sadler and others, which shows that he was an object of the conspiracy, though not necessarily a victim of it.

We find no error and the judgment is affirmed.

The other justices concurred.

NOTE. (By J. F. G.).—This opinion is subject to criticism on each of its main conclusions.

If arranging to give a spiritual seance in consideration of voluntary contributions is a conspiracy to defraud, why not apply the same rule to theater managers, who carry their flying girls through the air by means of invisible wires, circus operators for robbing human beings in gorilla hides, owners of a museum for labeling a corpulent hoosier as a fat man from Siberia, or showmen for exhibiting a painted tiger?

Penal laws are not enacted for the protection of gullible seekers for the marvelous; nor conspiracy laws to deal with the trifles of ordinary life. True, it may be criminal to materially defraud the ignorant by means which would not be effectual against the wary; but even had Sadler been deceived in the present instance, the prosecution resembles firing a naval gun at a mosquito.

Whatever might be said of the credulous members of the audience it must be remembered that Sadler was a detective who visited the entertainment in the pursuit of his own crafty arts. The case brings to mind that of *Conners v. People*, 18 Colo. 373—33 Pac. Rep. 159—25 L. R. A. 341—36 Am. St. Rep. 295, where a conviction for conspiracy to rob an express train was reversed, because a detective, acting for the Express Company assisted in planning the proposed robbery.

Variance between the indictment and the proof: We cannot agree with the court in holding that a charge of conspiracy to defraud a particular person can be sustained by proof of a conspiracy to defraud the public, or persons generally. This question was passed upon very logically by the Supreme Court of Massachusetts, many years ago in the case of *Commonwealth v. Harley*, which case is cited and approved by the Supreme Court of Illinois in the recent case of *Lowell v. People*, 229 Ill. 227—82 N. E. Rep. 226. In the latter case the court said:

"The most serious question raised in this record is whether the proof sustains the allegations of the indictment. The indictment does not charge plaintiff in error with obtaining money by false pretenses, but with entering into a conspiracy with Cowell to obtain money and property, to-wit, twelve dollars, from one Nelson R. Jackson. It is contended by plaintiff in error that as the indictment charges a conspiracy to defraud a particular individual it must be proven as alleged, and that it is not sufficient to prove a conspiracy to defraud the public

generally, or all persons whom they could procure to deal with them. The proof shows that Jackson took a policy in the Union Lloyds through plaintiff in error and Cowell, and paid premiums amounting in all to \$11.50. He did not, however, sustain any loss. Whether he would have been paid if he had sustained a loss can only be conjectured from the proof relating to the methods and practices of the parties toward others who did sustain losses. Cowell testified that he never knew Jackson, and that, when he and plaintiff in error associated themselves together, he had no intention of cheating or defrauding him out of any money or property, and that he never had any such intention at any time afterwards. It is clear from the proof that plaintiff in error and Cowell never conspired together to procure money from any particular person or persons, and that Jackson, a colored man running a barber shop, was to them unknown. The object and purpose of the parties in associating themselves together in the insurance business was to procure money from any and all persons whom they could induce to take policies in the organizations they represented.

"In *Commonwealth v. Harley*, 7 Metc. 506, the indictment charged defendants, Robert Harley and Philenia Harley, with conspiring, combining, and agreeing together to cheat and defraud one Stephen W. Marsh out of a pianoforte. The trial court instructed the jury that it was not necessary for the prosecution to prove an agreement or conspiracy to cheat and defraud Marsh in particular; but if the proof showed, beyond a reasonable doubt, that the defendants united and agreed together to cheat the public generally, or any individual whom they might meet, and be able to defraud, and in pursuance of that agreement one of the defendants made and delivered to the other defendant promissory notes to enable him to carry into effect the unlawful agreement, that the notes were received by said defendant with intent to use them for the purpose of cheating said Marsh, and that he did use them for that purpose and thereby cheat and defraud Marsh of a pianoforte, the offense against the defendants was proven, although it did not appear that Philenia Harley (the one who gave the notes) knew Marsh was the individual to be defrauded, or that the defendants had agreed together to perpetrate this particular fraud on him. The court held it was competent, in an indictment, to charge a conspiracy to defraud the public generally, but said: 'The Government having elected to set forth in the indictment a special intent to defraud Stephen W. Marsh as the object of the conspiracy on the part of both conspirators, Philenia Harley and Robert Harley, that allegation was a material one, and the Government was bound to establish it by proof. But that allegation could not be established by proof that the defendants conspired and agreed together to cheat the public generally, or any individual whom they might be able to defraud. Such fact of a conspiracy to cheat Stephen W. Marsh cannot be said necessarily to result, nor can it be legally inferred, from the fact of a conspiracy to cheat the public generally, or any

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person whom they might meet.' This rule was followed and the above case cited with approval in *Commonwealth v. Kellogg*, 7 Cush. 473.

"In 2 Wharton on Criminal Law, sec. 1396, after quoting from Tindal, C. J., it is said: 'Where, therefore, the persons injured were defined at the time of the conspiracy and ascertainable by the pleader, their names should be specified in the indictment. Where, however, the conspiracy was to defraud a class not capable of being at the time resolved into individuals, or to defraud the public generally, then the specification of names is impracticable and hence unnecessary. An intent to cheat A as an individual is not sustained by evidence of an intent to cheat the public generally.'

"In 2 McClain on Criminal Law, sec. 932, it is said: 'Where the charge is of a conspiracy to defraud in general, it is not necessary to specifically allege the name of the person or persons intended to be defrauded. It is enough to charge the intent to defraud persons of a particular class or description. But, if the conspiracy charged is to defraud a particular person, he should be named, and the proof must correspond to the allegation in this respect. If the charge is of a conspiracy to defraud the public generally, proof of an intent to defraud a particular person will constitute a variance. But it is not necessary to allege the names of all persons intended to be injured. It is sufficient to state the names of some and that the names of others are to the grand jurors unknown.'

"It is not necessary to the validity of an indictment for a conspiracy to cheat and defraud that it should set out the names of the persons intended to be cheated and defrauded if the conspiracy was not aimed at a particular or definite individual, but was aimed to cheat and defraud the public generally. In such case an indictment containing appropriate averments that a conspiracy was entered into by the defendants for the purpose of defrauding the public generally, or the State, or the United States, as the case may be, would be a good indictment. 2 Bishop on Crim. Proc. sec. 210. The rule has long been established that under an indictment for larceny a variance between the proof and the allegations of the indictment as to the ownership of the property is fatal. The rule appears to be the same in prosecutions for conspiracy to cheat and defraud. This indictment charges the defendants with conspiring to cheat and defraud Jackson, who was unknown to the defendants, or either of them, so far as the proof shows, before he took a policy in one of their companies. Jackson never sustained any loss, and no liability accrued to him on account of the insurance policy written for him in one of the organizations represented by plaintiff in error and Cowell. It cannot be said that the allegations of a conspiracy with the intent to cheat and defraud Jackson are sustained by proof of an intent to cheat and defraud the public generally. Neither can it be inferred from proof that some persons who insured with plaintiff in error and Cowell and paid their premiums sustained losses that were not paid, that, therefore, Jackson, who sustained

no loss, would have been refused payment if the insured property had been destroyed. In criminal cases it is not sufficient, to sustain a conviction on a particular charge, to prove that the defendant was guilty of some other charge or of general bad and criminal conduct; but the proof must establish his guilt of the particular charge set forth in the indictment. This rule was not complied with in this case, and we are of the opinion, therefore, the court erred in overruling the motion for a new trial.

"The judgment is therefore reversed, and the cause remanded.

"Reversed and remanded."

HANDLEY V. STATE.

115 Ga. 584—41 S. E. Rep. 992.

Decided June 4, 1902.

CONSPIRACY: *Limitation of joint responsibility for separate acts.*

The rule that, when individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is, in legal contemplation, the act of all, is subject to the qualification that each is responsible for the acts of the others only so far as such acts are naturally or necessarily done pursuant to, or in furtherance of, the conspiracy.

(Syllabus by the Court.)

Supreme Court of Georgia.

Error to Superior Court, Wilcox County; Hon. D. M. Roberts, Judge.

G. W. Handley, convicted of disorderly conduct, brings error. Reversed.

Hal Lawson, for plaintiff in error.

John F. De Lacy, Solicitor General, contra.

COBB, J. The accused was placed on trial, charged with the offense of using obscene and vulgar language in the presence of a female, and was convicted. He complains that the court erred in refusing to grant him a new trial.

It appears from the evidence that the accused, his son, and others went near the house of the prosecutor for the purpose of assisting his daughter to run away and marry the son of

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the accused, and that having waited the agreed time at the appointed place for the daughter of the prosecutor to appear, and she not having kept the engagement, the accused and the others started along the public road which passed the prosecutor's house; and while in front of the house the language set forth in the indictment was heard by the wife of the prosecutor, as well as by the prosecutor himself, both of whom testified that they recognized the voice of the accused. The accused, in his statement, denied having used the language alleged, or any similar language, on the occasion in question. The court charged the jury, in substance, that if the accused and others were engaged in a common design, and while they were acting in furtherance of that design any one of them used substantially the words alleged in the indictment in the presence of the wife of the prosecutor, without provocation, the accused would be guilty, notwithstanding he may not have used the words himself. Complaint is made that this charge was erroneous, for the reason that it does not state that the common design must have been unlawful, and for the further reason that, even if the common intent was unlawful, the act charged in the indictment was not one that was in furtherance of the common unlawful purpose. It does not appear from the record what was the age of the prosecutor's daughter, and therefore it cannot be determined whether the accused and those with whom he was associated for the purpose of enabling her to leave her father's home and marry the son of the accused were engaged in an unlawful enterprise. If the daughter was of full age, she had, if she desired to do so, a legal right to marry the son of the accused without the consent and against the wishes of her father; and any one who aided her in bringing about this result would not be guilty of engaging in any unlawful purpose, so long as they refrained from the commission of any unlawful act in the furtherance of this purpose. If, however, the daughter of the prosecutor was a minor under the age of eighteen years, and her father objected to her marriage with the son of the accused, and the accused and others assembled for the purpose of aiding her in escaping from her father's house for the purpose of contracting marriage with the son of the accused, this would be an unlawful purpose, and any member of the party would be responsible

In 115 Ga. the girl's age is put at fourteen years.

for any act done by any other member in furtherance of this common purpose, as well as for all the consequences which would naturally or necessarily result from any act done by any member of the party in pursuance of the common unlawful enterprise. See, in this connection, Pen. Code, § 110; *Cochran v. State*, 91 Ga. 763.

But even if the common design was unlawful, and if one member of the party departed from the original design as agreed upon by all of the members, and did an act which was not only not contemplated by those who entered into the common purpose, but was not in furtherance thereof, nor the natural or legitimate consequence of anything connected therewith, the person guilty of such act, if it was itself unlawful, would alone be responsible therefor. See 6 Am. & Eng. Enc. Law (2d ed.) pp. 870, 872; 1 Bish. New Cr. Law, § 634, subd. 2; *Ferguson v. State*, 32 Ga. 658. Conceding, for the sake of the argument, that the accused and those with whom he was associated were engaged in a common unlawful purpose on the occasion in question, the use of the words alleged in the indictment was not in furtherance of this common design. The use of obscene and vulgar language in the presence of a female was no part of the original design to aid the daughter of the prosecutor to escape from her home and marry the son of the accused. Such conduct on the part of any member of the party was not in contemplation by them when they associated themselves together for the purpose of assisting in bringing about the marriage, nor was the use of such words the natural or legitimate consequence of anything connected with that design. There being no evidence clearly identifying the accused as the one who used the language on the occasion in question, other than the testimony of the two witnesses who claimed to have recognized his voice, and it being possible that the jury might have believed that the accused did not use the language, but that it was used by some other member of the party, the error in the charge in question was of such a character as to require the granting of a new trial.

Judgment reversed. All the justices concurring, except LEWIS, J., absent on account of sickness.

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PEOPLE EX REL. LEWISOHN v. O'BRIEN.

PEOPLE EX REL. LEWISOHN v. WYATT.

176 N. Y. 253—68 N. E. Rep. 383.

Decided October 20, 1903.

CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION: *The constitutional protection not only extends to security against the furnishing evidence against one's self, but against opening any avenue through which incriminating testimony can be procured—A statute providing that involuntary testimony shall not be used against the giver, does not give complete immunity, and may be ignored by a witness—Authorities reviewed and a leading New York case overruled—Extent of the privilege.*

1. The provision of the Constitution of New York (Art. I, sec. 6), that no person "shall be compelled in any criminal case to be a witness against himself," is a complete guaranty, protecting any person from being compelled to give evidence, that, may either tend directly to incriminate himself, or which may open an avenue through which facts may be ascertained, or other testimony discovered, which could in a criminal prosecution be used against him.
2. Section 342 of the Penal Code of New York, which provides that such involuntary testimony cannot be used against the witness may be ignored by him, as it does not give him the protection guaranteed by the Constitution.

Court of Appeals of New York.

Appeal from Appellate Division of the Supreme Court, First Department.

The relator's petition for discharge upon writs of *habeas corpus* and *certiorari* was denied, by order of the Special Term. He appealed to the Appellate Division and this order was reversed. The respondent then appealed to the Court of Appeals. Affirmed.

William Travers Jerome, District Attorney (Howard Gans, of counsel) for the appellants.

Alfred Lauterbach and P. J. Rooney, for the appellee.

BARTLETT, J. In December, 1902, an information was presented to the Court of Special Sessions of the First Division

of the City of New York, charging in due form, that for the period beginning the first day of January, 1902, and ending the first day of December, 1902, one Richard A. Canfield was conducting a gambling house at No. 5 East 44th street, in the City of New York, and praying that subpoenas might issue in order that the matter be fully inquired into upon oaths of persons attending in obedience to such subpoenas.

Thereafter, at the request of the District Attorney, the magistrate issued a *subpoena* addressed to the relator herein, requiring him to attend before him and to answer such questions as might be put to him on the information against Canfield. The relator appeared and was duly affirmed, pursuant to law, and after stating upon examination that he had known the defendant Richard A. Canfield four or five years and that he had not been in the premises No. 5 East 44th street prior to December, 1899, was asked the following questions: "Q. Have you ever been in there in your life? Have you ever been in the premises No. 5 East 44th street, in the City and County of New York?" These questions the relator refused to answer on the ground, among others, that they might tend to criminate him.

The District Attorney thereupon promised the witness immunity, and called his attention to section 342 of the Penal Code as affording him complete protection. The court thereupon directed the witness to answer, and the latter said, "I respectfully decline, judge." Thereupon a complaint was made by a deputy assistant district attorney, duly setting forth the facts, and thereon and on certain exhibits annexed, the magistrate issued a warrant for the arrest of the relator, charging him with a criminal contempt of court. The warrant was thereupon delivered to the appellant Gannon, a peace officer, who arrested the relator.

After various proceedings unnecessary at this time to consider in detail, Gannon, the peace officer, was served with a writ of *habeas corpus*, commanding him to bring the relator before Justice Scott of the Supreme Court, and a writ of *certiorari* was also obtained directed to Justice Wyatt of the Special Sessions. Upon the hearing of the issues an order was made dismissing the writs and remanding the relator to the custody from which he was taken. Upon appeal the Appellate Division reversed this order with a divided court.

The relator seeks to justify his refusal to answer under article one, section six, of the Constitution of this State, which provides that no person "shall be compelled, in any criminal case, to be a witness against himself."

It is insisted on behalf of the People that the witness is fully protected by section 342 of the Penal Code, and should have been compelled to answer. The section reads as follows:

"No person shall be excused from giving testimony upon any investigation or proceeding for a violation of this chapter, upon the ground that such testimony would tend to convict him of a crime; but such testimony cannot be received against him upon any criminal investigation or proceeding."

The relator contends that this section does not afford him full protection, and is not as broad in its provisions as the Constitution. This constitutional provision is precisely the same in phraseology as the fifth amendment of the Constitution of the United States. The same language is also found, in substance, in many of the State Constitutions.

Early in the history of this court, in *People ex rel. Hackley v. Kelly* (24 N. Y. 74), this provision of the State Constitution was construed, the court holding that it did not protect a witness in a criminal prosecution against another person from being compelled to give testimony which implicates him in a crime, when he has been protected by statute against the use of such testimony on his own trial. Judge Denio said (pp. 82, 83): "It is perfectly well settled that where there is no legal provision to protect the witness against the reading of the testimony on his own trial, he cannot be compelled to answer. (*People v. Mather*, 4 Wend. 229, and cases there referred to.) This course of adjudication does not result from any judicial construction of the Constitution, but is a branch of the common-law doctrine which excuses a person from giving testimony which will tend to disgrace him, to charge him with a penalty or forfeiture, or to convict him of a crime. It is of course competent for the Legislature to change any doctrine of the common-law, but, I think, they could not compel a witness to testify on the trial of another person to facts which would prove himself guilty of a crime without indemnifying him against the consequences, because, I think, as has been mentioned, that, by legal construction, the Constitution would be found to forbid it. But it is proposed by the

appellant's counsel to push the construction of the Constitution a step further. A person is not only compellable to be a witness against himself in his own cause, or to testify to the truth in a prosecution against another person, where the evidence given, if used as his admission, might tend to convict himself if he should be afterwards prosecuted; but he is still privileged from answering, though he is secured from his answers being repeated to his prejudice on another trial against himself. It is no doubt true that a precise account of the circumstances of a given crime would afford a prosecutor some facilities for fastening the guilt upon the actual offender, though he were not permitted to prove such account upon the trial. The possession of the circumstances might point out to him sources of evidence which he would otherwise be ignorant of, and in this way the witness might be prejudiced. But neither the law nor the Constitution is so sedulous to screen the guilty as the argument supposes. If a man cannot give evidence upon the trial of another person without disclosing circumstances which will make his own guilt apparent, or at least capable of proof, though his account of the transactions should never be used as evidence, it is the misfortune of his condition and not any want of humanity in the law."

We thus have a clear interpretation of the constitutional provision which reads that "no person can be compelled, in any criminal case, to be a witness against himself," as follows: That the words "any criminal case" mean a criminal case against the witness; that the prohibition, "no person can be compelled * * * to be a witness against himself," is fully satisfied when the evidence of a witness taken on the trial of another person is held to be inadmissible on his own criminal prosecution; the fact that his evidence on the trial of another person may afford the public prosecutor some facilities for fastening the guilt upon himself does not permit him to be silent.

It is clear, if this case is to be regarded as containing a correct exposition of the constitutional provision under review, that the relator should have been required to answer the question propounded to him, as his protection, alike under the Constitution and the statute, is confined to the single provision that his evidence cannot be received against him in any criminal investigation or proceeding.

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The opinion in *People ex rel. Hackley v. Kelly* (*supra*) was written by a distinguished jurist, whose learning and ability have placed him among the great judges of this State who now rest from their labors.

It is with no little hesitation that this court feels constrained to adopt a less technical and more liberal interpretation of this brief provision of the Constitution.

As we have already pointed out, the Fifth Amendment to the Constitution of the United States contains the precise language of our State Constitution now under review.

In *Brown v. Walker* (161 U. S. 591, 606) the Supreme Court of the United States said:

"It is true that the Fifth Amendment to the Constitution of the United States does not operate upon a witness testifying in the State courts, as the first eight amendments to the Constitution of the United States are limitations only upon the powers of Congress and the Federal courts, and are not applicable to the several States, except so far as the Fourteenth Amendment may have made them applicable. (*Barron v. Baltimore*, 7 Peters, 243; *Fox v. Ohio*, 5 How. (U. S.) 410; *Withers v. Buckley*, 20 How. (U. S.) 84; *Twitchell v. Commonwealth*, 7 Wall. 321; *Presser v. Illinois*, 116 U. S. 252.)"

It, therefore, follows that while the case to which we are about to refer, of *Counselman v. Hitchcock* (142 U. S. 547), may not be binding as an authority upon this court, yet its reasoning is most persuasive and has been followed in several States of the Union whose Constitutions contain a similar provision to the one under consideration. (*Smith v. Smith*, 116 N. C. 386; *Ex parte Cohen*, 104 Cal. 524; *Ex parte Arnot Carter*, 166 Mo. 604; *Miskimins v. Shaver*, 58 Pac. Repr. (Wyo.) 411. See, also, *Emery's Case*, 107 Mass. 172.)

In *Counselman v. Hitchcock* (*supra*) it was held that where a person was under examination before a grand jury, in an investigation into certain alleged violations of the Interstate Commerce Act, he is not obliged to answer questions where he states that his answers might tend to criminate him, although section 860 of the United States Revised Statutes provides that no evidence given by him shall be in any manner used against him, in any court of the United States, in any criminal proceeding. The case before the grand jury was a criminal case. The meaning of the constitutional provision is not merely that

a person shall not be compelled to be a witness against himself in a criminal prosecution against himself, but its object is to insure that a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime.

Mr. Justice Blatchford, writing for the court, said (p. 562):

"It is broadly contended on the part of the appellee that a witness is not entitled to plead the privilege of silence except in a criminal case against himself, but such is not the language of the Constitution. Its provision is that no person shall be compelled *in any* criminal case to be a witness against himself. This provision must have a broad construction in favor of the right which it was intended to secure. The matter under investigation by the grand jury in this case was a criminal matter, to inquire whether there had been a criminal violation of the Interstate Commerce Act. If Counselman had been guilty of the matters inquired of in the questions which he refused to answer, he himself was liable to criminal prosecution under the Act. The case before the grand jury was, therefore, a criminal case. The reason given by Counselman for his refusal to answer the questions was that his answers might tend to criminate him, and showed that his apprehension was that, if he answered the questions truly and fully (as he was bound to do if he should answer them at all), the answers might show that he had committed a crime against the Interstate Commerce Act, for which he might be prosecuted. His answers, therefore, would be testimony against himself, and he would be compelled to give them in a criminal case. It is impossible that the meaning of the constitutional provision can only be that a person shall not be compelled to be a witness against himself in a criminal proceeding against himself. It would doubtless cover such cases, but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime."

At page 564 the learned judge continues: "It remains to consider whether section 860 of the Revised Statutes removes the protection of the constitutional privilege of Counselman. That section must be construed as declaring that no evidence obtained from a witness by means of a judicial proceeding shall

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be given in evidence or in any manner used against him or his property or estate in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture. It follows that any evidence which might have been obtained from Counselman by means of his examination before the grand jury could not be given in evidence or used against him or his property in any court of the United States in any criminal proceeding or for the enforcement of any penalty or forfeiture. This, of course, protected himself against the use of his testimony against him or his property in any prosecution against him or his property in any criminal proceeding in a court of the United States. But it had only that effect. It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him or his property in a criminal proceeding in such court. It could not prevent the obtaining and the use of witnesses and evidence which would be attributable directly to the testimony which he might give under compulsion and on which he might be convicted, when otherwise, and if he had refused to answer he could not possibly have been convicted."

The court thereupon held that section 860 of the United States Revised Statutes is not co-extensive with the constitutional provision, and that it was a reasonable construction of the provision that the witness is protected from being compelled to disclose the circumstances of his offense or the sources from which or the means by which evidence of its commission or of his connection with it may be obtained or made effectual for his conviction without using his answers as direct admissions against him.

Judge Blatchford stated that the court could not yield assent to the views expressed by the Court of Appeals of New York in *People ex rel. Hackley v. Kelly* (*supra*).

We are of opinion that the construction given to the very clear and plain words of the Constitution in *Counselman v. Hitchcock* is reasonable, fair, and accords a witness only such protection as the plain letter of the Constitution confers.

If this is not the proper construction, the witness might be required to disclose circumstances that would enable the public prosecutor to institute criminal proceedings against him wherein he might be convicted without reading his evidence taken in another case.

The language of Chief Justice Marshall in the Circuit Court of the United States for the District of Virginia (June, 1807), in *Burr's Trial* (1 Burr's Trial, 244), on the question whether the witness was privileged not to accuse himself, is as follows: "If the question be of such a description that an answer to it may or may not criminate the witness according to the purport of that answer, it must rest with himself, who alone can tell what it should be, to answer the question or not. If in such a case he may say upon his oath that his answer would criminate himself, the court can demand no testimony of the fact. * * * According to their statement (the counsel for the United States) a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable case, that a witness by disclosing a single fact may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing, but all other facts without it would be insufficient. While that remains concealed within his own bosom he is safe, but draw it from thence and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is obtainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer which discloses a fact that would form a necessary and essential part of a crime which is punishable by the laws."

A clearer and more cogent statement of the rule it would be difficult to find.

It is insisted by the counsel for the respondent that *People ex rel. Hackley v. Kelly* was overruled in *People ex rel. Taylor v. Forbes* (143 N. Y. 219). In that case there was no statute protecting the witness in the use of his testimony, and he

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having refused to answer, on the ground that to do so would tend to criminate him, this court held that the witness was in such a case the judge of the effect of answers sought to be drawn from him, and that nothing short of absolute immunity from prosecution could take the place of the constitutional privilege.

It is true that there are many expressions in the opinion of the court indicating its tendency to depart from the strict rule laid down in *People ex rel. Hackley v. Kelly*, but the case is not precisely in point.

The respondent also cites *Matter of Peck v. Cargil* (167 N. Y. 391) as sustaining his contention that *People ex rel. Hackley v. Kelly* can be no longer regarded as authority.

It is sufficient to say of the case cited that the point now under consideration was not directly presented, but in the opinion *Counselman v. Hitchcock* is cited with approval as sustaining the failure of the holder of a liquor tax certificate to file a verified answer in proceedings under the Liquor Tax Law.

It is true in this case, as in the one last cited, that the general language of the opinion indicates the tendency of the court to depart from the rule laid down in *People ex rel. Hackley v. Kelly*.

The learned Assistant District Attorney insists that while the case of *Counselman v. Hitchcock* has never been actually overruled, the court has refused to extend the principle, and has repudiated entirely the reasoning on which it was founded. In support of this contention *Brown v. Walker* (161 U. S. 591) is cited. That case involved the construction of the Act of 1893 in reference to producing books, papers, etc., before the Interstate Commerce Commission. The court pointed out that this Act was passed in view of the opinion of the court in *Counselman v. Hitchcock*, to the effect that section 860 of the United States Revised Statutes was not co-extensive with the constitutional provision. The court held in substance that the statute of 1893 was co-extensive with the Constitution in the immunity that it offered the witness, and that he was deprived of his constitutional right thereby and must answer the question.

The statement by way of criticism of *Counselman v. Hitchcock* is as follows (p. 600): "The danger of extending the principle announced in *Counselman v. Hitchcock* is that the

privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."

It is doubtless true that cases may arise where the mere fact of the witness asserting that to answer the question would tend to criminate him would not be conclusive. Where the court can see that the refusal to answer is a mere device to protect a third party, and that the witness is in no possible danger of disclosing facts that would lead to his own indictment and conviction, an answer may be insisted upon.

The decision in *Brown v. Walker* (*supra*) in no way militates against the construction of the Constitution in *Counselman v. Hitchcock*. It merely argues that the rule might be used for improper purposes and to shield the guilty. Any general rule is subject to abuse, and the court will be always vigilant to see that it is not employed in the interests of fraud and to secure a failure of justice. It is clear that in *Counselman v. Hitchcock* the rule was properly applied, and we accord to that decision our full approval.

This distinction is to be kept in mind as to the attitude of a witness before the court where complete statutory protection, co-extensive with the constitutional provision, exists, and where it is lacking.

In the former situation the witness is deprived of his constitutional right of refusing to answer.

The point was decided by this court in *People v. Sharp* (107 N. Y. 427), and by the Supreme Court of the United States in *Brown v. Walker* (161 U. S. 591). We adhere to the point thus decided.

In the latter situation, where statutory immunity does not exist, which was dealt with by Chief Justice Marshall in language already quoted (1 Burr's Trial, 244), it rests with the witness whether he will answer or not, except, as we have pointed out, where the refusal is clearly a fraudulent device to protect a third party.

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In thus extending the rule, as hitherto laid down by this court, we are persuaded that the complete immunity sought to be afforded the citizen by the Constitution from being a witness against himself in any criminal case is fully secured. The evolution of this right has been slow, indeed, since the days of the Star Chamber in England, when defendants, on a refusal to be sworn against themselves, were whipped at the cart's tail and pilloried; had ears cut off and noses slit; were fined enormous sums and imprisoned for years.

The methods of the seventeenth century were long since abandoned, but the desire to elicit from a suspected or accused person evidence that would send him to the cell or the scaffold unfortunately survives, and this court has, in recent years, been called upon to condemn on several occasions modes of procedure having that end in view.

In the case at bar, in view of the principles of law discussed, the relator was justified in refusing to answer the questions propounded to him, on the ground that the answers would tend to criminate him.

It is quite impossible for the court to say to what extent the witness, if he answered, would be inriminated or placed in jeopardy. He might be subjected to proceedings involving penalty or forfeiture; he might be tried and convicted as a common gambler, which is declared by statute to be a felony. All this might be accomplished without using his evidence against him, if given herein.

We assume, as did the Appellate Division, that it is not contended by the prosecution that the questions which the relator refused to answer were preliminary in character, but rather that it is conceded by both parties that they are so framed as to call for a decision on the merits.

The order appealed from should be affirmed, with costs, the writs sustained and the relator discharged.

GRAY, J. What hesitation I have, in agreeing to an affirmation, is because the effect of our decision will be to change a rule of construction, which was early laid down in this State in *People ex rel. Hackley v. Kelly*, and to overrule the authority of that case. I find no decision of this court which has gone that far. But the rule of that case, being one of evidence, or of procedure, may be changed, and should be changed, if not

consistent with the enjoyment of the full measure of the citizen's constitutional rights. It is my judgment that the reasoning of the opinion of the United States Supreme Court in *Counselman v. Hitchcock*, is more convincing, in giving a construction to the language of the constitutional clause, than is that of this court, as expressed in its opinion in the *Hackley Case*. I therefore, am willing to place this court in accord with the later expressed views of the Federal tribunal. I think that the words "in any criminal case," which are used in the constitutional clause, are entitled, when we consider the moving principle for its incorporation into the fundamental law of the State, to a broader construction than was accorded to them in the *Hackley Case*.

If the interests of the People are deemed to require it, it is, of course, quite competent, and proper, for the legislative body to provide for an exemption of the witness from liability to prosecution, as broad in its effect as is the constitutional privilege.

PARKER, C. J.; O'BRIEN, HAIGHT, CULLEN and WERNER, J.J. (and GRAY J., in memorandum), concur with BARTLETT, J.

Order affirmed.

LASHER V. THE PEOPLE.

183 Ill. 226—47 L. R. A. 802—75 Am. St. R. 103—55 N. E. Rep. 663.

Opinion filed December 18, 1899.

CONSTITUTIONAL LAW—COMMISSION MERCHANTS: *Limit of legislation as to police regulations—Commission business a proper subject for legislation—What a franchise is—Commission Merchants' Act of 1899 in part unconstitutional.*

1. In enacting laws for the purpose of police regulation the Legislature may form classes, provided the classification rests upon a reasonable basis and does not arbitrarily discriminate between persons in substantially the same situation.
2. The business of dealing in the small products of the farm on commission is of a nature which may be productive of great abuses, and the Legislature may enact regulating laws applicable to cities of such sizes as in the legislative judgment would permit the existence and growth of such abuses.

3. The Commission Merchants' Act of 1899 (Laws of 1899, p. 364,) is not invalid because it excepts from its operation those who deal in grain, live stock and dressed meat, since the latter are subject to other statutory regulations, and the action of the Legislature in putting commission merchants dealing in the small products of the farm into a separate class rests upon a reasonable ground.
4. A franchise, within the meaning of section 22 of article 4 of the Constitution, prohibiting the passage of any special law granting any special franchise to any corporation, association or individual, is a special privilege granted by the State which does not belong to citizens of the country, generally, by common right.
5. The power of appointment to public office is a franchise, since no private corporation, association or individual has such power as a matter of common right, but only by virtue of legislative grant.
6. That portion of the Commission Merchants' Act of 1899 which creates a board of inspectors with power to grant licenses, and which requires commission merchants to obtain such licenses and imposes a penalty for failure to do so, is void, as in violation of section 22 of article 4 of the Constitution, since the members of the board are State officers, the power of appointing whom is conferred by the act upon five private corporations specified therein.
7. The invalidity of the provisions of the Commission Merchants' Act of 1899 concerning the board of inspectors, their powers, rights and duties, does not affect sections 1 and 2 of the act, which are separable from the invalid provisions.

Supreme Court of Illinois.

Writ of error to the Criminal Court of Cook County; the Hon. Theodore Brentano, Judge, presiding.

Two convictions against, under the Commission Merchants Act of 1899. Reversed.

Darrow, Thomas & Thompson, for the plaintiffs in error.

Edward C. Akin, Attorney General (*Charles S. Deneen*, State's Attorney, and *W. M. McEwen*, of counsel), for the People.

MR. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court.

Plaintiffs in error in these two cases were defendants in the Criminal Court of Cook County under indictments charging them with the violation of "An act to regulate the shipping,

consignment and sale of produce, fruits, vegetables, butter, eggs, poultry or other products or property, and to license and regulate commission merchants and to create a board of inspectors and to prescribe its powers and duties," in force April 24, 1899. The indictment against Charles W. Lasher charged him with soliciting consignments of butter and eggs for sale on commission as a commission merchant without procuring a license from the board of inspectors of the State of Illinois to carry on said business. Edward C. Reichwald and William G. Reichwald were charged in the indictment against them with receiving on consignment for sale on commission, as commission merchants, certain green and deciduous fruits, consisting of grapes, plums and peaches, without first procuring such license. The defendants were tried before the court without a jury, and they raised the question of the validity of the statute providing for a board of inspectors and a license to be issued by such board, both by motions to quash the indictments and by propositions of law submitted to the court. The charges in the indictments were proved on the trials and were not disputed. The court held the law valid, fined the defendants and entered judgments against them.

The first section of the act in question provides for making reports to consignors and remitting to them the proceeds of sale, with itemized statements, and for keeping records of transactions. The second section imposes a penalty for violating any of the provisions of the act. Sections 3 to 8 inclusive are as follows:

"Sec. 3. That a board of inspectors is hereby created, to be composed of one member from each of the following organizations: Illinois State Horticultural Society, Illinois State Dairymen's Association, Illinois State Retail Dealers' Association, Chicago Butter and Egg Board and Chicago Branch of National League of Commission Merchants. In case any of the aforesaid organizations are not incorporated under the laws of the State of Illinois at the time of going into effect of this act, they shall not be disqualified from furnishing said members if the incorporation is completed on or before January 1, 1900. The members of said board of inspectors shall be selected from the membership of said organizations by the members thereof at some regular or special meeting at which there shall be a quorum, and shall serve for

a period of one year. In case of the failure or refusal of any such organization to so elect a member of such board of inspectors, it shall be the duty of the remaining members of said board to fill such vacancy by the selection of some person representing the line of business the representative organization of which has failed or refused to so elect. Each member of said board shall receive as his compensation the sum of ten dollars (\$10) for each session attended, and ten cents per mile additional when required to travel a distance of more than ten miles to attend such meeting.

"Sec. 4. Said board of inspectors shall organize by electing from their number a president, a vice-president and a treasurer, and may appoint a secretary, and, if needed, two inspectors, such secretary and inspectors to be compensated by said board. It shall be the duty of the secretary to receive complaints regarding the disposition of the articles of country produce shipped on commission to licensed receivers, and instruct inspectors to investigate the same, and make a report to be submitted to said board at its next regular meeting.

"Sec. 5. Said board shall meet monthly on the second Wednesday of each month for the purpose of transacting such business as may come before them; and said board is hereby authorized to provide a room or place of meeting and for permanent headquarters in the city of Chicago at an annual rental of not more than seven hundred and fifty dollars (\$750), said rent to be paid from the funds of said board. A detailed statement of all expenditures of the board shall be made to the Governor each year.

"Sec. 6. Every person, firm or corporation in the State of Illinois, doing business in a city of more than fifty thousand population receiving on consignment for sale on commission butter, eggs, poultry, game, dressed calf, green and deciduous fruits, berries, and other commodities the product of the farm, with the exception of grains, live stock and dressed meats, shall first procure from the board a license to carry on said business, for which said party or parties shall pay into the State treasury the sum of twenty-five dollars (\$25) annually, said license to be renewed annually.

"Sec. 7. The board shall have power to prescribe a system of books and accounts to be kept by licensed commission re-

ceivers, and said inspectors and members of said board, or duly authorized agents of said board, shall have access to such books, accounts and memoranda upon demand, and have power to send for books and papers and examine under oath. Any refusal upon the part of said licensed dealers to exhibit such said books, accounts or memoranda, when called upon to do so by such legally constituted authorities, shall forfeit the license held, which shall not be re-issued inside of three months without unanimous consent of said board.

"Sec. 8. It shall be unlawful for any person, firm or corporation to receive or solicit consignments of such country produce as is mentioned in this act without first obtaining such license, and violators shall be fined not less than \$50 nor more than \$200, and it shall be the duty of the State's Attorney of the county wherein prosecutions are brought to prosecute such violations, and the board may, at its discretion, employ such counsel as they may deem necessary for the prosecution of such violation."

The remainder of the act makes provision for the prosecution of offenses and the revocation of licenses by the board, requires the payment of a fee of one dollar by any person making complaint, which is to be turned over to the Treasurer of the State, and provides for the payment of expenses of the board out of the State treasury.

It is first argued that the statute is invalid as discriminating between commission merchants, because it excepts those who deal in grain, live stock and dressed meats. The claim is, that produce commission merchants constitute a class, and that the Legislature must require a license from all or none. This objection to the law is not valid. The Legislature has power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference, but the classification in this case is a natural one. The commission merchants dealing in the kinds of produce named in this act, which constitute the small products of the farm, are of a different class from those who transact business in the great markets for the sale of grain, live stock and dressed meats. The State laws for the inspection of grain provide for the protection of shippers in that market, and there is also State inspection of live stock and

dressed meats. The law which classifies small commission merchants engaged in the produce commission business rests upon a reasonable ground as a basis for the classification. Such a business may afford great opportunities for swindling, and be productive of great abuses, and the Legislature may properly enact a law applying to cities of such size as in the legislative judgment would permit the growth and existence of such abuses.

Another ground of objection made to the act is, that the provisions which create a board of inspectors with power to grant licenses, and which require commission merchants to procure such licenses and impose a penalty for the failure to do so, are void, as repugnant to Section 22 of Article 4 of the Constitution, which prohibits the Legislature from passing any law granting to any corporation, association or individual any special or exclusive privileges, immunity or franchise whatever. The provisions in question are special in their nature, and the act names five corporations upon which it confers the power to appoint a board of inspectors to be selected from the membership of such corporations. If the power to appoint such a board of inspectors constitutes a franchise, then there can be no doubt that the Legislature had no power to confer such a franchise upon the corporations named in the act. A franchise has been often defined, so that the meaning of the term is well settled. Blackstone's definition is: "A royal privilege or branch of the king's prerogative subsisting in the hands of a subject." (2 Blackstone's Com. 21.) In this country it is a special privilege granted by the State, which does not belong to citizens of the country generally by common right. This is the distinguishing feature of a franchise. A right which belongs to the Government when conferred upon the citizen is a franchise. No one can exercise the right of eminent domain, or establish a highway or railway and charge tolls for the same, without a grant from the Legislature. Such rights as inhere in the sovereign power can only be exercised by the individual or corporation by virtue of a grant from such sovereign power, and when the State grants such a right it is a franchise. (*Board of Trade v. People*, 91 Ill. 80; *People v. Holtz*, 92 *id.* 426.) In the former of these cases the distinction between a franchise and a privilege which belongs to the citizen of common right was pointed out, and in the latter case it was said: "If the constitutional convention and the

General Assembly used the term according with its strict legal import—and we must suppose they did—then, in this country, it can only embrace corporations, ferries, bridges, wharfs and the like; and we may add the elective franchise, as it is granted by the Constitution to a portion of the people to elect their officers.” A franchise must be granted by the Legislature, and a municipal body cannot confer a franchise. (*Chicago City Railway Co. v. People*, 73 Ill. 541; *Metropolitan City Railway Co. v. Chicago West Division Railway Co.*, 87 *id.* 317.) Now, the power to appoint to office in a monarchy is a royal privilege or branch of the King’s prerogative. It is an attribute of sovereignty, and does not belong to citizens generally, by common right. Blackstone includes this power among the prerogatives of the King, and says that offices are in his disposal as sovereign. (1 Blackstone’s Com. 272.) The power to appoint to office is within the definition of Blackstone, which was adopted in the cases above referred to. In this State the people, in their sovereign capacity, through the Constitution, conferred the elective franchise upon a portion of the citizens having certain qualifications, as was said in *People v. Holtz*, *supra*. The General Assembly was prohibited from exercising the power of appointment, and as to certain other officers the following provision was made: “The Governor shall nominate, and by and with the advice and consent of the Senate (a majority of all the Senators selected concurring, by yeas and nays), appoint all officers whose offices are established by this Constitution, or which may be created by law, and whose appointment or election is not otherwise provided for; and no such officer shall be appointed or elected by the General Assembly.” (Const. sec. 10, art. 5.) Appointment to office is a large part of the official power belonging to the Governor, under our Constitution, as the chief executive. Under a somewhat similar prohibition against the exercise of the appointing power by the General Assembly, it was held in *State v. Kennon*, 7 Ohio, St. 546, that the Legislature had no power to confer upon three persons named by the Legislature the power to appoint certain officers. No private corporation and no individual has the power of appointment to any office as a matter of common right, and cannot have any such power except by virtue of a legislative grant.

In *People v. Holtz*, *supra*, it was held that an office is not

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a franchise, and it is argued that consequently the power to appoint to office is not a franchise, privilege or immunity. It does not follow that because the office is not a franchise the power to appoint to it is not. The power of appointment to an office and the office itself are entirely distinct and of a different nature. A citizen may hold the title to an office and perform its functions, but the power to create the office and designate such functions and fill the office must rest in the Government or some governmental agency.

But it is said that these inspectors are not officers of the State because they exercise their duties within the limits of cities of more than fifty thousand population, and that we have sustained laws investing officers of the judicial department with the power to appoint local or municipal officers. These inspectors are authorized to perform their duties throughout the State wherever there is a city of more than fifty thousand population. A law applying to cities of such size is considered general, operating throughout the State, because its provisions will apply wherever there may be such a city. These officers are required to report to the Governor each year, their license fees and fees for complaints are turned into the State treasury, and the expenses are paid out of the State treasury. Our Constitution defines an office as follows: "An office is a public position created by the Constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when that purpose is accomplished." (Const. sec. 24, art. 5.) These officers serve for the period of one year, and are appointed annually. The board is a State board, and is so described in each indictment. The cases relied upon to sustain this law relate to local and municipal officers, and do not hold that the Legislature may vest the power of appointment in private corporations. The power in each case was vested in a branch of the State Government. The statute passed upon in *People v. Morgan*, 90 Ill. 558, authorizes the judges of the Circuit Court of Cook County to fill vacancies in the offices of South Park Commissioners, and the Election law which was sustained in *People v. Hoffman*, 116 Ill. 587, provided that the judge of the County Court might appoint election commissioners. The question mainly discussed in those cases was whether the

power of appointment could be exercised by the judicial branch of the Government, and in each case the law providing for the appointment was adopted by a vote of the municipality affected. With reference to the appointment of South Park Commissioners it was said that the power might, no doubt, be sustained on the ground that its exercise was the act of an individual who was the incumbent of the office of judge; but that statement, if entirely accurate, should be taken with reference to a case where the people had adopted a law containing a provision for such an appointment. The case was decided and the law sustained on the ground that the Legislature might authorize a judicial officer to exercise the power as to a local officer. We have not been referred to any case where the Legislature has attempted to confer the power of appointment upon a private corporation. So far as appears, such a law is without precedent in this State. In *Bunn v. People*, 45 Ill. 397, it was held that the commissioners appointed under the act for the erection of a new State house were not officers but employes of the State, and in *Kilgour v. Drainage Comrs.* 111 Ill. 342, and *People v. Inglis*, 161 *id.* 256, it was held that the Legislature might impose new duties upon officers already elected, and that the imposition of such new duties was not the appointment of an officer. They have no bearing on the question involved here.

The board of inspectors provided for by this act are general officers of the State, and it seems beyond question that the power to appoint them is a franchise, which the act in question attempts to grant to five corporations. The Legislature was powerless to clothe these corporations with an attribute of sovereignty by granting to them this special privilege. The Criminal Court was wrong in holding the provisions in question to be valid.

We see no objection to the first and second sections of the act, which are separable from the invalid provisions.

The judgments are reversed.

Judgment reversed.

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STATE v. MONTGOMERY.

94 Me. 192—80 Am. St. R. 386—47 Atl. Rep. 165.

Decided May 28, 1900.

CONSTITUTIONAL LAW—ALIENS' RIGHTS—HAWKERS AND PEDDLERS:
Hawkers' and Peddlers' Act, allowing licenses to citizens only in violation of the Fourteenth Amendment of the Constitution of the United States—The obnoxious provision inseparable from the rest of the act—Police power.

1. The Fourteenth Amendment of the Constitution of the United States, in declaring that no State shall "deny to any person within its jurisdiction the equal protection of the laws," permits aliens to enter into business on the same terms as citizens.
2. The Hawkerc' and Peddlers' Act of Maine limiting the granting of licenses to citizens of the United States and forbidding the granting of them to others, is unconstitutional and void, and being inoperative against aliens, is an unjust discrimination against citizens, by requiring them to do that which is not required of aliens.
3. As the unconstitutional provision of the Act cannot be separated from the constitutional parts, the discrimination between aliens and citizens being a fundamental part of it, it is void as an entirety.
4. The Act cannot be considered as a constitutional exercise of the police powers of the State, as the discrimination is not against any class of persons disqualified by character or habits, or harmful to society, but against a class simply as aliens, such discrimination being forbidden by law.

Exceptions from Supreme Judicial Court of Maine, Franklin County.

William C. Montgomery, convicted of peddling without a license, brings exceptions. Exceptions sustained.

The action was on a complaint before the Municipal Court of Farmington for a violation of the statutes of 1889, c. 298, as amended by Laws of 1893, c. 282 and c. 306. Originally the case was tried before that court and has been once before this court in the form of a report upon facts agreed. The case was argued at July term of this court 1898 and is reported in 92 Me. p. 433; 43 Atl. Rep. 13. In accordance with the decree, that the "case stand for trial," the case was again tried at the February term of this court in Franklin

County. At the close of the testimony, and before the presiding judge instructed the jury, the defendant asked for the giving of fourteen specific instructions, which request was denied by the court. *The court thereupon, with other instructions, instructed as follows: "that the defendant was amenable to the statute of the State, the Act of 1889, c. 298, relating to hawkers and peddlers; that he was not protected or justified by any law of this State or by the Constitution of this State, or by the Constitution of the United States, or by any act of Congress, in performing these acts without a license granted to him under the provisions of our own statute."

To this ruling and to the instruction given, the defendant took his exceptions. The jury returned a verdict of guilty.

Elmer E. Richards, County Attorney, for the State.

Clarence Hale, *Arthur F. Belcher* and *Joseph C. Holman*, for the defendant.

Sitting: *WISWELL, C. J.*; *EMERY, HASKELL, STROUT, SAVAGE, FOGLER, JJ.*

SAVAGE, J. This case has been once before this court upon a report of facts agreed (92 Me. 433, 43 Atl. 13), with the result that the case was ordered to "stand for trial." At the trial at *nisi prius* the respondent was found guilty of going about from place to place in Farmington, then and there carrying for sale and exposing for sale certain picture frames, without being licensed therefor, and in violation of the Laws of 1899, c. 298, as amended by the Laws of 1893, cc. 282, 306. He now brings the case forward upon exceptions to certain instructions which were given, and certain which were refused to be given, to the jury by the presiding justice. We do not deem it necessary to consider the exceptions seriatim. The several requested instructions present the grounds upon which the respondent bases his claim that the statute in question is unconstitutional; but we shall, we think, be able to dispose of the case by a consideration of the instruction which was actually given to the jury, and which was "that the defendant was amenable to the statute of this State (the Act of 1889, c.

*As the opinion is based on the instruction given, we omit the instructions requested, but refused. (J. F. G.)

298) relating to hawkers and peddlers; that he was not protected or justified by any law of this State, or by the Constitution of the State, or by the Constitution of the United States, or by Act of Congress, in performing these acts without a license granted to him under the provisions of our own statute."

This instruction raises in the broadest manner the constitutionality of the Hawkers' and Peddlers' Act. The facts relied upon by the State to support the prosecution are the same which are stated in the opinion in 92 Me. 433, 43 Atl. 13. We shall not review that opinion, nor do we intend to change it. So far as concerns any point that was decided then, it stands.

Much of the argument of the learned counsel for the respondent relating to the interstate commerce clause of the United States Constitution, we think, is inapplicable to the facts presented. In exceptions and in argument they overlook the fact, as we deem it to be, that the picture frames in question at the time of the alleged offense had ceased in any way to be the subject of interstate commerce. They had been shipped to this State unsold. They had been taken from the carrier. The packages had been opened, and the respondent was carrying them about from place to place in this State, offering them for sale. No person had agreed to buy them, or any of them, before they were shipped here. No person here was under any contract with regard to them. Another agent of the respondent's employer had secured orders for pictures, and, "on securing an order," *left* a contract with the party giving the order, in which it was stated that "all portraits are delivered in appropriate frames," which patrons may buy, or not, as they desire. It does not even appear that the picture frames were in any way an inducement to the giving of the order. It rather appears that the statement in the "contract" was made as an inducement to the patrons to buy at some future time picture frames "*at greatly reduced prices.*" *Quod est demonstrandum.*

These considerations, we think, take this case out of the protection of the interstate commerce provision of the Constitution, giving to Congress the power to regulate "commerce among the States." Nor does the fact that the Hawkers' and Peddlers' Act may, under some conditions, be void as to goods

which are at the time the subject of interstate commerce, necessarily render it invalid as to all goods under all conditions.

A legislative act may be entirely valid as to some classes of cases, and clearly void as to others. *Cooley*, Const. Lim. (6th ed.) p. 213. Judge Cooley says: "If there are any exceptions to this rule, they must be of cases only where it is evident, from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purposes of the Legislature will be defeated if it shall be held valid as to some cases and void as to others." *Tiernan v. Rinker*, 102 U. S. 123, 26 L. Ed. 103; *Packet Co. v. Keokuk*, 95 U. S. 80, 24 L. Ed. 377. This is undoubtedly sound doctrine. To illustrate: If it were held otherwise, our highway damage law would have been rendered entirely inoperative by the decision in *Pearson v. Portland*, 69 Me. 278, holding that a single provision in the statute which existed then was obnoxious to the clause in the Fourteenth Amendment declaring that no State shall deny to persons within its jurisdiction the equal protection of the laws. Such, too, would have been the effect upon our prohibitory liquor law by the decision in *State v. Intoxicating Liquors*, 85 Me. 158 (*), holding, under the laws which then existed, that intoxicating liquors in the possession of a common carrier, and in transit from another State to this, were "commerce among the several States," and so within the protection of the interstate commerce provision of the Constitution of the United States. But no one would claim, we think, that either of these statutes was to be regarded as wholly unconstitutional because a single provision was held unconstitutional. *Presser v. People*, 116 U. S. 252, 6 Sup. Ct. 580, 29 L. Ed. 615; *Rothermel v. Meyerle*, 136 Pa. St. 250, 20 Atl. 583, 9 L. R. A. 366.

Accordingly we hold that, whatever may be the effect of the statute as to goods which are properly subject to interstate commerce protection, it is clearly constitutional, in this respect, as to goods which have completed their transit, have ceased to be objects of interstate commerce, and have become a portion

*The 94 Me. gives this citation as, 85 Me. 158, while the 47 Atl. Rep. gives it as, 85 Me. 304, which is the only case of that name in the 85 Me.; but it is not in point. *State v. Intoxicating Liquors*. 83 Me. 158; 21 Atl. Rep. 84. is directly in point. (J. F. G.)

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of the mass of the property in the State, as in this case. When goods are sent from one State to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws, provided that no discrimination be made against them as goods from another State. *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Brown v. Houston*, 114 U. S. 622, 5 Sup. Ct. 1091, 29 L. Ed. 257; *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754. When a package is broken up for use or for retail by the importer, it ceases to be under interstate commerce protection, and becomes subject to the laws of the State, and its sale may be regulated by the State like any other property. *Cooley*, Const. Lim. (6th ed.) p. 717; *License Cases*, 5 How. 589, 12 L. Ed. 256; *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. Ed. 1015.

A statute of a State by which peddlers of goods, going from place to place within the State to sell them, are required, under a penalty, to take out and pay for licenses, and which makes no discrimination between residents of the State and those of other States, is not, *as to peddlers of goods previously sent to them by manufacturers in other States*, repugnant to the grant by the Constitution to Congress of the power to regulate commerce among the several States. *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430.

But the respondent goes further, and raises a question not raised at the former hearing of this case, and not then considered or decided. He says that the provision in section 2 of the Hawkers' and Peddlers' Act which provides that a license shall be granted "to any citizen of the United States, * * *" but "to no other person," is obnoxious to the Fourteenth Amendment to the Constitution of the United States, by which it is declared that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is clear that by the provisions of the statute only citizens of the United States can be licensed to peddle. An alien cannot be licensed. A discrimination is made between citizens and aliens. Does this discrimination violate the constitutional provision which we have cited? This presents a

Federal question, and properly we seek an answer first in the decisions of the United States courts.

If this were a question of discrimination against "citizens of the United States," the solution would be easy. The *privileges and immunities*, guaranteed by the clause in the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, are said in *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, to be the relief "from the disabilities of alienage in other States. It (the clause in question) inhibits discriminating legislation against them by other States; it gives them the right of ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws."

It is not in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give to its citizens essential privileges connected with that business which it denies to citizens of other States. See *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432.

The use of the phrase "privileges and immunities," in the constitutional provision referred to, plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging, and when there of engaging, in lawful commerce, trade, or business, without molestation. *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449; *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394; *In re Watson* (D. C.) 15 Fed. 511; *Sayre Borough v. Phillips*, 148 Pa. St. 482, 24 Atl. 76, 16 L. R. A. 49; *Bliss's Petition* (*), 63 N. H. 135; *State v. Lancaster*, 63 N. H. 267; *State v. Wiggin*, 64 N. H. 508, 15 Atl. 128, 1 L. R. A. 56.

The decisions all hold in effect, and some of them in terms, that the business of peddling, which is lawful in itself, cannot be regulated by a State so as to discriminate against citizens of the United States. We do not see how it could be held

*In 47 Atl. Rep. this case is cited as, *In re Bliss*, but the above is as it is cited in the official report, and is correct. (J. F. G.)

otherwise. It is a "privilege" to be enjoyed on equal footing with citizens of the State.

But, on the other hand, an alien is not a citizen. He is, however, a "person" whom the State cannot deprive of life, liberty, or property without due process of law, and to whom the State cannot deny, while he is within its jurisdiction, "the equal protection of the laws." This was settled in *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220. It was the case of an unnaturalized Chinaman, and it was held that the "constitutional provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." See, also, *Fraser v. McConway & Torley Co.* (C. C.) 82 Fed. 257. While an alien is not entitled to the "privileges and immunities" of a citizen, strictly as such, under the first clause of the Fourteenth Amendment, which we have quoted, he is, while within our jurisdiction, entitled to the "equal protection of the laws."

And, after all, the distinction between the practical rights of the citizen under the guaranty of "privileges and immunities" and the rights of the alien "within the jurisdiction," under the guaranty of "the equal protection of the laws," is, so far as the prosecution of the business of peddling is concerned, shadowy and unsubstantial. One has the privilege; the other the right of a protection equal to that of the citizen. This want of distinction is noticed by Swayne, J., in the *Slaughter-House Cases*, 16 Wall. 36, 21 L. Ed. 394, who, after referring to the rights secured to citizens, said: "In the next category, obviously *ex industria*, to prevent as far as may be the possibility of misinterpretation, either as to persons or things, the phrases 'citizens of the United States' and 'privileges and immunities' are dropped, and more simple and comprehensive terms are substituted. The substitutes are 'any person,' and 'life,' 'liberty,' and 'property,' and 'the equal protection of the laws.' 'The equal protection of the laws' is guaranteed to all. 'The equal protection of the laws' places all upon a footing of legal equality, and gives the same protection to all for the preservation of life, liberty and property, and the pursuit of happiness." To be sure, these words are found in a dissenting opinion, but they were not concerning any subject of dissent, and are entitled to weight as the expression of a wise and experienced judge.

In fact, as we shall hereafter see, this construction of the phrase "equality of the laws," has been adopted, with greater particularity, by the Supreme Court of the United States. It was concerning this clause that the court in *Strander v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664, asked: "What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States; * * * that no discrimination shall be made against them because of their color?"

The language of Justices Field and Clifford in *Ex parte Virginia*, 100 U. S. 339, 25 L. Ed. 676, is that: "The reach and influence of the amendment are immense. It opens the courts of the country to every one, on the same terms, for the security of his person or property, the prevention and redress of wrongs, and the enforcement of contracts. It assures to every one the same rules of evidence and modes of procedure; it allows no impediments to the acquisition of property and the pursuit of happiness, to which all are not subjected; it suffers no other or greater burdens or charges to be laid upon one than such as are equally borne by all others. * * * It secures to all persons their civil rights upon the same terms."

Says Field, J., in *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567, dissenting from the proposition that practical exclusion of colored persons from the jury was a denial of that equality of protection which has been secured by the Constitution and laws of the United States:

"Equal protection of the laws of a State is extended to persons within its jurisdiction, within the meaning of the amendment, when its courts are open to them on the same condition as to others, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; when they are subjected to no restrictions in the acquisition of property, the enjoyment of personal liberty, and the pursuit of happiness, which do not greatly affect others; when they are liable to no other or greater burdens and charges than such as are laid upon others; and when no different or greater punishment is enforced against them for a violation of the laws."

Like definitions of the clause "equal protection of the laws" are found in *Pace v. Alabama*; 106 U. S. 583, 1 Sup. Ct. 637,

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27 L. Ed. 207; *Minneapolis, Etc., Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585.

In the *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. 18, 27 L. Ed. 835, it was declared that: "Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not in any just sense incidents or elements of slavery. Such, for example, would be * * * denying to any person or class of persons, the right to pursue any peaceful vocations allowed to others. What is called, 'class legislation,' would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment. * * * The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class or to any individual the equal protection of the laws."

In *Santa Clara Co. v. Southern Pac. R. Co.* (C. C.) 18 Fed. 385; *id.*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118 (*), it is said:

"By 'equal protection' is meant equal security to every one in his private rights—in his right to life, to liberty, to property and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens and charges than such as are imposed upon all others under like circumstances. This protection attends every one everywhere, whatever be his position in society or his association with others—either for profit, improvement, or pleasure,"

See, also, *H. v. Kow v. Nunan*, 5 Sawy. 552 Fed. Cas. No. 6546.

So in *Brier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, it was said: "The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of life or liberty, or arbitrary spoliation of property, but that equal pro-

*We have corrected this citation, the official report making a mistake as to one page number, and the Atl. Rep. as to another. (J. F. G.)

tection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; * * * that no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition." And such is the construction which this court, following the Federal Court, has given to the amendment in question. *Leavitt v. Canadian Pacific Railway Co.*, 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152.

While it is held that the Fourteenth Amendment does not interfere with the police power of a State, it is also held that the police regulations must be impartial. The court said in *Barbier v. Connolly, supra*: "Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which in carrying out a public purpose is limited in its application, if, within the sphere of its operation, it affects alike all persons similarly situated, is not within the amendment." *Minneapolis, Etc., Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; *State v. Dering*, 84 Wis. 585, 54 N. W. 1104.

The specific regulations for one kind of business which may be necessary for the protection of the public can never be just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges upon the same conditions. *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145.

See, also, *Missouri Pacific Railway v. Mackey*, 127 U. S. 205, 8 Supt. Ct. 1161, 32 L. Ed. 107; *Marchand v. Penn. Railroad Co.*, 153 U. S. 380, 14 Sup. Ct. 894, 38 L. Ed. 751; *Leavitt v. Canadian Pacific Railway Co.*, 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152.

The inhibition of the Fourteenth Amendment that no State

shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person, or class of persons, from being singled out as a special subject for discriminating and hostile legislation. *Pembina Min. & Mill. Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650; *Janesville v. Carpenter*, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808; *Nashville, Etc., Railway Co. v. Taylor* (C. C.), 86 Fed. 168.

In *Re Tiburcio Parrott* (C. C.) 1 Fed. 481, holding unconstitutional a provision in the Constitution of California which prohibited corporations from employing Chinese or Mongolians, the court said: "It appears that to deprive a man of the right to select and follow any lawful occupation * * * is to deprive him of both liberty and property, within the meaning of the Fourteenth Amendment."

A statute of Pennsylvania imposing a tax of three cents a day upon employers of foreign-born, unnaturalized male persons, for each day that each of such persons may be employed, and authorizing the deduction of that sum from the wages of such employes, was held to deprive the latter of the equal protection of the laws. *Fraser v. McConway & Torley Co.* (C. C.) 82 Fed. 257. The court said: "Evidently the act is intended to hinder the employment of foreign-born, unnaturalized male persons. The act is hostile to and discriminates against such persons. It interposes to the pursuit by them of their lawful avocations, obstacles to which others under like circumstances are not subjected."

While it is true, as a general proposition, that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection, yet it is equally true that such a classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily, and without any such basis. *Gulf, Colorado & Santa Fe Railway v. Ellis*, 165

U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666. See *Pearson v. Portland*, 69 Me. 278.

In the light of these interpretations of the Fourteenth Amendment, we are compelled to conclude that a statute which forbids peddling except under a license, and which provides that citizens of the United States may be licensed, and that aliens shall not be, is a denial of the "equal protection of the laws." It is an unconstitutional discrimination against aliens. It does more than impose unequal burdens and charges upon the alien. It absolutely denies him the privilege of an occupation open to citizens, which is more than a discrimination in burdens. It does not permit the alien within our jurisdiction to pursue a business occupation and to acquire and enjoy property on equal terms with the citizen. *Yick Wo v. Hopkins*, *supra*.

Nor can this discrimination be sustained as a constitutional exercise of the police power of the State. It must be noticed that the discrimination is not against a class, as criminals, as paupers, as intemperate, as disqualified by character or habits, or as harmful to society, but against a class solely as aliens. Such a discrimination is forbidden. *Gulf, Colorado & Santa Fe Railway v. Ellis*, *supra*.

And, although, in this case the discrimination was not injurious to the respondent, because he was not an alien and was not thereby prohibited from obtaining a license, still, for reasons already suggested, we think the Hawkers' and Peddlers' Act must be regarded as invalid *in toto*. We cannot separate the constitutional part from the unconstitutional. The distinction between citizens and aliens is fundamental in the scheme for licensing.

The statute is invalid as to aliens. They may peddle without license. If we hold it is nevertheless valid as to citizens, it works a discrimination against citizens and in favor of aliens—a result which we think the Legislature plainly did not intend. *Cooley*, Const. Lim. (6th ed.) p. 213.

Exceptions sustained.

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STATE V. SHEDROI.

75 Vt. 277—63 L. R. A. 179—98 Am. St. Rep. 825—54 Atl. Rep. 1081.

Decided May, 16, 1903.

CONSTITUTIONAL LAW—PEDDLERS: *Unjust discrimination in favor ex-soldiers who reside in Vermont and who have been honorably discharged from service as Union soldiers in the Civil War.*

It is in violation of the Fourteenth Amendment of the Constitution of the United States, to provide, by statute, a penalty for peddling without a license, and to exempt from the prosecution, residents of the State, "who served as soldiers in the war for the suppression of the Rebellion in the Southern States, and were honorably discharged."

Supreme Court of Vermont.

Exceptions from Caledonia County Court; Watson, Judge.

Information against Albert Shedroi for peddling without a license. Demurrer overruled *pro forma*, and information adjudged sufficient. The respondent brings exceptions. Reversed.

Argued before TYLER, MUNSON, START, WATSON, STAFFORD, and HASELTON, JJ.

M. G. Morse, State's Attorney, for the State.

G. C. Frye, for the respondent.

WATSON, J. The respondent is informed against for becoming a peddler without a license in force, under the provisions of V. S. c. 198, as amended by No. 94, Acts of 1900, and the case is here upon demurrer to the information. It is contended that the law upon which this information is based is in conflict with the Fourteenth Amendment to the Constitution of the United States.

That the license fee required to be paid under the provisions of this chapter for the privilege of selling goods as a peddler is a tax upon the goods themselves was determined by this court in *State v. Hoyt*, 71 Vt. 59, 42 Atl. 973. In that case the law was held to discriminate unjustly against goods manufactured in this State, and for that reason unconstitutional. Later

the law was so amended as to avoid such discrimination. Acts of 1900, No. 94.

V. S. 4732 provides that a person who becomes a peddler without a license in force, as provided in that chapter (198) shall be fined not more than three hundred dollars and not less than fifty dollars.

By V. S. 4733 persons resident of this State who served as soldiers in the war for the suppression of the Rebellion in the Southern States, and were honorably discharged, are exempt from the payment of a license tax under the provisions of that chapter. It is urged that herein the law unjustly discriminates in favor of such soldiers and against other persons, by reason of which it is in violation of the Fourteenth Amendment, whereby no State can "deny to any person within its jurisdiction the equal protection of the laws."

Can such an exemption be made by the Legislature without affecting the validity of the general provisions of that chapter, is the question.

In *Bell's Gap R. R. Co. v. Penn.*, 134 U. S. 232, 10 Sup. Ct. 533, 33 L. Ed. 892, speaking through Mr. Justice Bradley, the court said: "The provision of the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation, in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature or the people of the State in framing their Constitution. But clear and hostile discrimination against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impossible and unwise to attempt to lay down any general rule or

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definition on the subject that would include all cases. They must be decided as they arise. We think we are safe in saying that the Fourteenth Amendment was not intended to compel a State to adopt any iron rule of equal taxation." And in *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, the court, speaking through Mr. Justice Field, said this Amendment, "in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition; and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." And in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037, it is said that the rule only prescribes that the "law have the attribute of equality of operation; and equality of operation does not mean indiscriminate operation on persons merely, as such, but on persons according to their relation." Such is the rule laid down by this court in *State v. Hoyt*, above cited. It was there held that the mere fact of classification is not enough to exempt the operation of the statute from the equality clause of the Constitution, but that it must also appear that the classification made is one based upon some reasonable ground, some difference which bears a just and proper relation to the attempted classification, and not a mere arbitrary selection.

By the law in question the Legislature has made a classification by placing persons resident of the State, who served as soldiers in the Civil War, and were honorably discharged, in

one class, and all other citizens together in another class. All persons engaged in the business of peddling, whether they belong to the one class or the other, must have a license in force, or be subject to a penalty; but a license tax is required to be paid by persons in the latter class, while a license may be had by all in the former class without the payment of such tax. The classification, therefore, is one of taxation. From one class a tax on their goods authorized so to be sold is exacted for the privilege of doing business as a peddler, while the other class may carry on the same business in the same manner, sell the same kind and quality of goods in the same territory, without payment of such tax.

Does this classification have the equality of indiscriminate operation on all persons licensed thus to do business according to their relations? Upon the answer to this question being in the affirmative or in the negative depends the validity or the invalidity of the law in question under the equality clause of the Fourteenth Amendment.

Upon what basis does the attempted classification rest? There is no basis upon which it can rest except that persons in the one class served as soldiers in the Civil War, and were honorably discharged, and those of the other class did not serve, or were not honorably discharged. This classification is dependent solely on a condition of things long since past, and not on a present situation or condition, nor on a substantial distinction having reference to the subject-matter of the law enacted. The veterans were originally from no particular class, and when discharged from the army they returned to no particular class—they again became a part of the general mass of mankind, with the same constitutional rights, privileges, immunities, burdens, and responsibilities as other citizens similarly circumstanced in law, in the same jurisdiction.

Assuming that thus to have served as a soldier and to have received an honorable discharge may well merit reasonable considerations at the hands of the State in recognition of patriotism and valor in defense of a common country, yet such considerations cannot exceed those constitutional limits established for the welfare and protection of the whole; for equal protection of the laws requires "that all persons subjected to such legislation shall be treated alike under like circumstances and

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conditions, both in the privileges conferred and liabilities imposed." *Magoun v. Bank*, above cited.

It cannot be said that service as a soldier in the Civil War and the receipt of an honorable discharge bear any relation to the business of a peddler as defined by the law under consideration. There is no difference between the present conditions and circumstances of such veterans and those of other citizens regarding the relations to the law or the attempted classification. In fact, according to their relations, they are of the same class, and any attempted classification between them is but a mere arbitrary selection, and based upon no reasonable grounds.

In *State v. Hoyt*, referring to the equality clause, it is said that it is enough if there is no discrimination in favor of one against another of the same class; but that when such discrimination exists, it impairs that equal right which all can claim in the enforcement of the laws. And the cases of *State v. Harrington*, 68 Vt. 623, 35 Atl. 515, 34 L. R. A. 100; and *State v. Cadigan*, 73 Vt. 245, 50 Atl. 1079, 57 L. R. A. 666, 87 Am. St. Rep. 714, are much in point. In the former the respondent was charged with selling and exposing for sale goods, wares, and merchandise as an "itinerant vendor," without a license therefor. It was contended upon demurrer to the information that the law upon which the prosecution was based discriminated between itinerant vendors and resident vendors, and between classes of itinerant vendors, and therefore it was in conflict with both the State and Federal Constitutions. It was held that the State might require a license fee from persons in one occupation, and not from those in another, provided no discrimination was made between those of the same class. In the latter case, the respondent was charged with acting as agent of a partnership organized under the laws of the State of New York in selling certain municipal bonds here without the partnership having procured a license from the Inspector of Finance, etc., as required by the laws of this State. It was held that to discriminate between residents of our own State by denying to one class the privilege of transacting business without complying with conditions and exactions not required of others, when the ground of classification is wholly fanciful and arbitrary, is a denial of the equal protection of the laws.

The constitutional right of a State Legislature to discriminate in favor of persons who served in the army or navy of the

United States in the Civil War has been before the court of last resort in several of the sister States. In New York the Constitution provides that appointments and promotions in the civil service "shall be made according to merit and fitness, to be ascertained so far as practicable by examinations which, so far as practicable, shall be competitive." In the matter of *Keymer*, 148 N. Y. 219, 42 N. E. 667, 35 L. R. A. 447, it was held that a provision of the civil service law in effect that as to honorably discharged soldiers and sailors of the Civil War competitive examinations should not be deemed practicable or necessary in cases where the compensation or other emolument of the office does not exceed four dollars per day was in conflict with the Constitution. And a somewhat similar law in Massachusetts, purporting absolutely to give veterans particular and exclusive privileges different from those of the community in obtaining public office, was held to be not within the constitutional power of the Legislature. *Brown v. Russell*, 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357.

In Iowa the Constitution provides that "all laws of a general nature shall have a uniform operation; the General Assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall equally belong to all citizens." A statute requiring peddlers to procure a license and to pay a license tax contained the provision that the section requiring the payment of the tax should not be held to apply "to persons who have served in the Union army or navy." In *State v. Garbroski*, 111 Iowa, 496, 82 N. W. 959, 56 L. R. A. 570, 82 Am. St. Rep. 524, it was contended that because of this immunity from the tax to peddlers who so served in the army or navy the law was void. In an extended opinion, reviewing many authorities, the court, saying that the attempted classification is based on no apparent necessity or difference in condition or circumstances that have any relation to the employment in which the veteran of the Civil War is authorized to engage without paying license, and that it savors more of philanthropy than of reasonable discrimination based upon real or apparent fitness for the work to be done, held the law unconstitutional.

We think it clear that the discrimination made in the law in question in favor of persons who served in the War of the

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Rebellion and were honorably discharged is without reasonable ground, and arbitrary, having no possible connection with the duties of the citizens as taxpayers, and their exemption from the payment of the tax therein required of others exercising the same calling is pure favoritism, and a denial of the equal protection of the laws. It follows that section 4732 of the Vermont Statutes is unconstitutional, and without force, and that section 4733 of the Vermont Statutes, so far as it relates to the payment of license required by said chapter 198, is unconstitutional, and without force.

Pro forma judgment reversed, demurrer sustained, information adjudged insufficient and quashed, the respondent discharged and let go without day.

NOTE (By J. F. G.)—A vicious feature of the Act, not noticed in the opinion, is that the exemption was limited to honorably discharged soldiers of the Civil War, excluding all other honorably discharged soldiers. An aged veteran of the Mexican War, or a disabled and honorably discharged soldier of the Spanish War, would not come within the terms of the, supposed, humane provision.

FAIRBANK v. UNITED STATES.

181 U. S. 283—45 L. Ed. 862—21 Sup. Ct. Rep. 648.

Argued December 13, 1900.

Decided April 15, 1901.

CONSTITUTIONAL LAW: *Revenue Stamp Act of June 13, 1898, held by a majority of the Court, five Justices, to contain an unconstitutional provision as to stamps on bills of lading for exports; four Justices dissent—Duty of the Court to uphold the Constitution—Rules for construing statutes in the light of the Constitution—Effect and limit of official construction and long-continued usage—Many authorities reviewed both in the opinion of the majority, and, in the dissenting opinion.*

1. The "judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this Nation."
2. "The constitutionality of an Act of Congress is a matter always requiring the most careful consideration. The presumptions

are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear. And yet, when clear, if written Constitutions are to be regarded of any value, the duty of the court is plain to uphold the Constitution, although in doing so the legislative enactment falls."

3. While in some cases doubts as to the validity or construction of a statute may be solved by the practical construction placed upon it by Congress or by the department charged with their execution or by long-established usage and construction by such department or officer, yet even long-continued construction or usage will not control where there is no doubt as to the proper construction of such statute.
4. "A stamp tax on a foreign bill of lading is in substance and effect a tax on the articles included in that bill of lading, and therefore a tax or duty on exports, and in conflict with the constitutional prohibition" against tax on exports.
5. The fact that the Stamp Act of June 13, 1898, placed a different rate on foreign bills of lading from other bills of lading, indicated an effort to lay an unconstitutional burden on exports. The amount of the tax is immaterial—it is a question of power.

Supreme Court of the United States.

Error to the District Court of the United States for the District of Minnesota.

The plaintiff in error was convicted and fined under the Act of June 13, 1898, for failure to attach a revenue stamp to an export bill of lading. Reversed.

Statement by Mr. JUSTICE BREWER:

On March 7, 1900, plaintiff in error was convicted in the District Court of the United States for the District of Minnesota on the charge of issuing, as agent of the Northern Pacific Railway Company, an export bill of lading upon certain wheat exported from Minnesota to Liverpool, England, without affixing thereto an internal revenue stamp, as required by the Act of June 13, 1898, c. 448, 30 Stat. 448. Upon that conviction he was sentenced to pay a fine of \$25. His contention on the trial was that that Act, so far as it imposes a stamp tax on foreign bills of lading, is in conflict with Article 1, § 9, of the Constitution of the United States, which reads: "No tax or duty shall be laid on articles exported from any State." This contention was not sustained by the trial court, and this writ of

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error was sued out to review the judgment solely upon the foregoing constitutional question.

Section 6 of the Act reads:

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in schedule A of this Act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed, by any person or persons or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures against the same respectively, or otherwise specified or set forth in the said schedule."

In schedule "A" is this clause:

"Bills of lading or receipt (other than charter party) for any goods, merchandise, or effects, to be exported from a port or place in the United States to any foreign port or place, ten cents."

Also the following:

"It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as is in this Act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent."

And this proviso at the end of the schedule:

"*Provided*, That the stamp duties imposed by the foregoing schedule on manifests, bills of lading, and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America."

Mr. C. W. Bunn, for plaintiff in error.

Mr. Solicitor General Richards, for defendant in error.

Messrs. *George A. King* and *William B. King*, for other interested parties.

MR. JUSTICE BREWER delivered the opinion of the court:

The constitutionality of an Act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear. And yet, when clear, if written Constitutions are to be regarded as of value, the duty of the court is plain to uphold the Constitution, although in so doing the legislative enactment falls. The reasoning in support of this was, in the early history of this court, forcibly declared by Chief Justice Marshall, in *Marbury v. Madison*, 1 Cranch 137, 177 (2 L. ed. 60, 73) and nothing can be said to add to the strength of his reasoning. His language is worthy of quotation:

"The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it.

"If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

"Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the Nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

"This theory is essentially attached to a written Constitution, and is consequently to be considered, by this Court, as one of the fundamental principles of our society.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

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the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

"If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

* * * * *

"The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts as well as other departments are bound by that instrument."

This judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this Nation. That in the enforcement of this rule the decisions, National and State, are not all in harmony is not strange. Conflicts between Constitutions and statutes have been easily found by some courts. It has been said, and not inappropriately, that in certain States the courts have been strenuous as to the letter of the State Constitution, and have enforced compliance with it under circumstances in which a full recognition of the spirit of the Constitution and the general power of legislation would have justified a different conclusion. We do not care to enter into any discussion of these varied decisions. We proceed upon the rule, often expressed in this Court, that an Act of Congress is to be accepted as constitutional unless on examination it clearly appears to be in conflict with provisions of the Federal Constitution.

In the light of this rule the inquiry naturally is, Upon what principles and in what spirit should the provisions of the Federal Constitution be construed? There are in that instrument grants of power, prohibitions, and a general reservation of ungranted powers. That in the grant of powers there was no purpose to bind governmental action by the restrictive force of a code of criminal procedure has been again and again asserted. The words expressing the various grants in the Consti-

tution are words of general import, and they are to be construed as such, and as granting to the full extent the powers named. Further, by the last clause of § 8, Art. 1, Congress is authorized "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by their Constitution in the Government of the United States, or in any department or office thereof." This, construed on the same principles, vests in Congress a wide range of discretion as to the means by which the powers granted are to be carried into execution. This matter was at an early day presented to this Court, and it was affirmed that there could be no narrow and technical limitation or construction; that the instrument should be taken as a Constitution. In the course of the opinion the Chief Justice said:

"The subject is the execution of those great powers on which the welfare of a Nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which Government should, in all future time, execute its powers, would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the Legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances." *McCulloch v. Maryland*, 4 Wheat. 316, 415 (4 L. ed. 579, 603).

And thereafter, in language which has become axiomatic in constitutional construction (p. 421, L. ed. 605)—

"We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must

allow to the National Legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

It is true that in that and other kindred cases the question was as to the scope and extent of the powers granted, and the language quoted must be taken as appropriate to that question and as stating the rule by which the grants of the Constitution should be construed.

We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action, and it seems to us clear that the same rule and spirit of construction must also be recognized. If powers granted are to be taken as broadly granted, and as carrying with them authority to pass those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety. It would be a strange rule of construction that language granting powers is to be liberally construed, and that language of restriction is to be narrowly and technically construed. Especially is this true when in respect to grants of powers there is, as heretofore noticed, the help found in the last clause of the 8th section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose.

With this rule in mind we pass to a consideration of the precise question presented. The constitutional provision is, "no tax or duty shall be laid on any articles exported from any State." The statute challenged imposes on "bills of lading for any goods, merchandise, or effects, to be exported from any

port or place in the United States to any foreign port or place, ten cents." The contention on the part of the Government is that no tax or duty is placed upon the articles exported; that, so far as the question is in respect to what may be exported and how it should be exported, the statute, following the Constitution, imposes no restriction; that the full scope of the legislation is to impose a stamp duty on a document not necessarily though ordinarily, used in connection with the exportation of goods; that it is a mere stamp imposition on an instrument, and, similar to many such taxes which are imposed by Congress by virtue of its general power of taxation, not upon this alone, but upon a great variety of instruments used in the ordinary transactions of business. On the other hand, it is insisted that though Congress by virtue of its general taxing power may impose stamp duties on the great bulk of instruments used in commerce, yet it cannot in the exercise of such power interfere with that freedom of governmental burden in the matter of exports which it was the intention of the Constitution to protect and preserve. It must be noticed that by this Act of 1898, while a variety of stamp taxes are imposed, a discrimination is made between the tax imposed upon an ordinary internal bill of lading and that upon one having respect solely to matters of export. An ordinary bill of lading is charged 1 cent; an export bill of lading 10 cents. So it is insisted that there was not simply an effort to place a stamp duty on all documents of a similar nature, but, by virtue of the difference, an attempt to burden exports with a discriminating and excessive tax.

The requirement of the Constitution is that exports should be free from any governmental burden. The language is, "no tax or duty." Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress; and as, in accordance with the rules heretofore noticed, the grants of powers should be so construed as to give full efficacy to those powers and enable Congress to use such means as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction

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imposed. If, for instance, Congress may place a stamp duty of 10 cents on bills of lading on goods to be exported, it is because it has power to do so; and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. *Ubi ergo*, for the purposes of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution.

The power to tax is the power to destroy. And that power can be exercised, not only by a tax directly on articles exported, but also and equally by a stamp duty on bills of lading evidencing the export. To the suggestion that a stamp duty is necessarily small in amount, we reply that the fact is to the contrary. The Act by which the stamp tax in question was imposed imposes a like tax on many other instruments, and in some instances graduating the amount thereof by the value of the property conveyed or affected by the instrument taxed. Thus, "each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange, or board of trade, or other similar place" is subject to a stamp tax in the sum of 1 cent for each \$100 of value of the property sold or agreed to be sold. Bills of exchange are likewise taxed by a gradual scale. Deeds or other instruments for the conveyance of land are charged with a stamp tax of 50 cents for each \$500 of value of property conveyed. And so of others. It is a well known fact that under this graduated system many instruments are subject to stamp duties of large amount. No question has ever been raised as to this power of graduating, and if valid in the cases of bills of exchange, agreements of sale, or conveyances of property, it is equally valid as to bills of lading. The fact that Congress has not graduated the stamp tax on bills of lading does not affect the question of power. By a graduated system, although the tax is called a tax on "the vellum, parchment, or paper" upon which transactions are written, or by which they are evidenced, a burden may be cast upon exports sufficient to check or retard them, and which will directly conflict with the constitutional provision that no tax or duty shall be laid thereon. The question of power is not to be

determined by the amount of the burden attempted to be cast. The constitutional language is, "no tax or duty." A 10-cent tax or duty is in conflict with that provision as certainly as a 100-dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount, but one of power. The applicable maxim is, "*Obsta principiis*," not, "*De minimis non curat lex*."

Counsel for the Government, in his interpretation of the scope and meaning of this constitutional limitation, says:

"To give Congress the power to lay a tax or duty 'on articles exported from any State' meant to authorize inequality as among the States in the matter of taxation. If the North happened in control in Congress, it might tax the staples of the South; if the South were in power, it might place a duty on the exports of the North. As a part, therefore, of the great compromise between the North and the South, this clause was inserted in the Constitution. The prohibition was applied, not to the taxing of the act of exportation or the document evidencing the receipt of goods for export, for these exist with substantial uniformity throughout the country, but to the laying of a tax or duty on the *articles exported*, for these could not be taxed without discriminating against some State and in favor of others."

This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated, it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation—all exportation—shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue," but the motion was voted down. So it is clear that the framers of the Con-

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stitution intended, not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires, not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation; and, as we have shown, a stamp tax on a bill of lading, which evidences the export, is just as clearly a burden on the exportation as a direct tax on the article mentioned in the bill of lading as the subject of the export.

In *Nicol v. Ames*, 173 U. S. 509 (43 L. ed. 733, 19 Sup. Ct. Rep. 522), we had occasion to consider this very Act in reference to another stamp duty required by the same schedule "A," to-wit, the clause:

"Upon each sale, agreement of sale, or agreement to sell any products or merchandise at any exchange, or board of trade, or other similar place, either for present or future delivery, for each one hundred dollars in value of said sale or agreement of sale or agreement to sell, one cent, and for each additional one hundred dollars, or fractional part thereof in excess of one hundred dollars, one cent."

We sustained that tax as a tax upon the privilege or facilities obtained by dealings on exchange, saying (p. 521, L. ed. 793, Sup. Ct. Rep. 527):

"A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property."

If it be true that a stamp tax required upon every instrument evidencing a sale is really and practically a tax upon the property sold, it is equally clear that a stamp duty upon foreign bills of lading is a tax upon the articles exported.

These considerations find ample support in prior adjudications of this Court. Thus, in *Almy v. California*, 24 How. 169, 174, (16 L. ed. 644, 646), it appeared that the State of California had imposed a stamp tax on bills of lading for gold or silver shipped to any place outside of the State; and the contention was that such stamp tax was not a tax on the goods themselves, but the Court said:

"But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported."

It is true that thereafter, in *Woodruff v. Parham*, 8 Wall. 123 (19 L. ed. 382) it was held that the words "imports" and "exports," as used in the Constitution, were used to define the shipment of articles between this and a foreign country, and not that between the States, and while, therefore, that case is no longer an authority as to what is or what is not an export, the proposition that a stamp duty on a bill of lading is in effect a duty on the article transported remains unaffected. In other words, that decision affirms the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. But that principle is not dependent alone upon the case cited. It was recognized long anterior thereto, in *Brown v. Maryland*, 12 Wheat. 419 (6 L. ed. 678). In that case it appeared that the State of Maryland, in order to raise a revenue for State purposes, required all importers of certain foreign articles to take out a license before they were authorized to sell the goods so imported; and it was held that such license tax, although in form a tax upon the person importing, for the privilege of selling the goods imported, was in fact a tax on imports, and that the mode of imposing it by

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giving it the form of a tax on the occupation of importer merely varied the form without changing the substance. The argument in the opinion in that case, announced by Chief Justice Marshall, remains unanswered. As the States cannot directly interfere with the freedom of imports they cannot by any form of taxation, although not directly on the importation, restrict such freedom, Congress alone having the power to prescribe duties therefor. In like manner, the freedom of exportation being guaranteed by the Constitution it cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance. In the course of his argument Chief Justice Marshall used this illustration:

"All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself. It is true the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not the right to do, because it is prohibited by the Constitution." (P. 444, L. ed. 687.)

The first clause of § 8 of Article 1 of the Constitution gives to Congress "power to lay and collect taxes, duties, imposts, and excises." Were this the only constitutional provision in respect to the matter of taxation, there would be no doubt that, tried by the settled rules of constitutional interpretation, Congress would have full power and full discretion as to both objects and modes of taxation. But there are also expressed in the same instrument three limitations. As said by Chief Justice Chase, in the *License Tax Cases*, 5 Wall. 462, 471 (18 L. ed. 497, 500):

It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of appor-

tionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion."

This proposition is restated by counsel for Government at the commencement of his argument, and is undoubtedly correct. We have hitherto had occasion to consider the two qualifications—the one, that direct taxes must be imposed by the rule of apportionment, and the other, that indirect taxes shall be uniform throughout the United States. In the *Income Tax Cases*, *Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 429 (39 L. ed. 759, 15 Sup. Ct. Rep. 673), 158 U. S. 601 (39 L. ed. 1108, 15 Sup. Ct. Rep. 912), the constitutional provision as to the apportionment of direct taxes was elaborately considered, and it was held that a tax on the income made up of the rents of real estate, and one on the income from personal property, were substantially direct taxes on the real estate and the personalty. In the first of these cases, on page 581, L. ed. 819, Sup. Ct. Rep. 689, discussing the principles of constitutional construction, the Chief Justice said:

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance, and not the form, which controls, as has indeed been established by repeated decisions of this Court. Thus, in *Brown v. Maryland*, 12 Wheat. 419, 444 (6 L. ed. 678, 687), it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself.'

"In *Weston v. Charleston*, 2 Pet. 449 (7 L. ed. 481) it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the city of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice

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Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds, and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the court, Chief Justice Marshall delivering the opinion, overruled that contention.

"So in *Dobbins v. Erie County Comrs.*, 16 Pet. 435 (10 L. ed. 1022), it was decided that the income from an official position could not be taxed if the office itself was exempt.

"In *Almy v. California*, 24 How. 169 (16 L. ed. 644), it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Northern Railroad Co. v. Jackson*, 7 Wall. 262 (19 L. ed. 88), that a tax upon the interest payable on bonds was a tax, not upon the debtor, but upon the security; and in *Cook v. Pennsylvania*, 97 U. S. 566 (24 L. ed. 1015), that a tax upon the amount of sales of goods made by an auctioneer was a tax upon the goods sold.

"In *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, and *Leloup v. Port of Mobile*, 127 U. S. 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized. And so, although it is thoroughly settled that where by way of duties laid on the transportation of the subjects of interstate commerce, and on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such taxation amounts to a regulation of such commerce, and cannot be sustained, yet the property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or domestic commerce, may be taxed, and when the tax is substantially a mere tax on property, and not one imposed on the privilege of doing interstate commerce, the exaction may be sustained. 'The substance, and not the shadow, determines the validity of the exercise of the power.' *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 698."

In *Knowlton v. Moore*, 178 U. S. 41 (44 L. ed. 969, 20 Sup. Ct. Rep. 747), we considered the qualification in the matter of uniformity. The question presented was the validity of the inheritance tax imposed by the Act of June 13, 1898. 30 Stat. 448. After showing that the tax was not a direct tax

within the constitutional meaning of the term, we examined the objection that it was not uniform throughout the United States, and, after full consideration, held that the uniformity required was a geographical, and not an intrinsic, uniformity, and was synonymous with the expression "to operate generally throughout the United States." While upon some of the questions in that case there was a difference of opinion, yet concerning the construction of the uniformity clause the justices who took part in the decision were agreed. After discussing the construction of the uniformity clause, Mr. Justice White, speaking for the court, proceeded to show that the tax in question did not violate such uniformity. There was no suggestion that the qualification could be disregarded or limited in any legislation; the opinion proceeded upon the assumption that the uniformity provision was an absolute restriction on the power of Congress, and the argument was to demonstrate that the tax in question in no manner conflicted with either the letter or spirit of such restriction. If it had been in the mind of the court that such restriction as to uniformity could be evaded by a mere change in the form of legislation, the opinion could have been less elaborate and the difficulties of the case largely avoided.

We have referred to these cases for the purpose of showing that the rule of construction of grants of powers has been also applied when the question was as to restrictions and limitations. Other cases may also well be referred to in this connection.

In *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489 (30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592), the question presented was whether an Act of the State of Tennessee, requiring "all drummers and all persons not having a regular licensed house of business in the taxing district (of Shelby County) offering for sale, or selling, goods, wares, or merchandise therein by sample," to pay a certain tax to the county trustee, could be enforced as to those drummers who were engaged simply in soliciting business in the State of Tennessee in behalf of citizens of other States. It was held that it could not, that such act of solicitation, being a matter of interstate commerce, was therefore beyond the power of the State to regulate. In the opinion, Mr. Justice Bradley, speaking for the court, said:

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"In view of these fundamental principles which are to govern our decision, we may approach the question submitted to us in the present case, and inquire whether it is competent for a State to levy a tax or impose any other restriction upon the citizens or inhabitants of other States for selling or seeking to sell their goods in such State before they are introduced therein. Do not such restrictions affect the very foundation of interstate trade? How is a manufacturer or a merchant of one State to sell his goods in another State without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them? This may, undoubtedly, be safely done with regard to some products for which there is always a market and a demand, or where the course of trade has established a general and unlimited demand. A raiser of farm produce in New Jersey or Connecticut, or a manufacturer of leather or woodenware, may, perhaps, safely take his goods to the city of New York and be sure of finding a stable and reliable market for them. But there are hundreds, perhaps thousands, of articles which no person would think of exporting to another State without first procuring an order for them. It is true, a merchant or manufacturer in one State may erect or hire a warehouse or store in another State, in which to place his goods, and await the chances of being able to sell them. But this would require a warehouse or store in every State with which he might desire to trade. Surely, he cannot be compelled to take this inconvenient and expensive course. In certain branches of business it may be adopted with advantage. Many manufacturers do open houses or places of business in other States than those in which they reside, and send their goods there, to be kept on sale. But this is a matter of convenience, and not of compulsion, and would neither suit the convenience nor be within the ability of many others engaged in the same kind of business, and would be entirely unsuited to many branches of business. In these cases, then, what shall the merchant or manufacturer do who wishes to sell his goods in other States. Must he sit still in his factory or warehouse, and wait for the people of those States to come to him? This would be a silly and ruinous proceeding.

"The only other way, and the one, perhaps, which most extensively prevails, is to obtain orders from persons residing

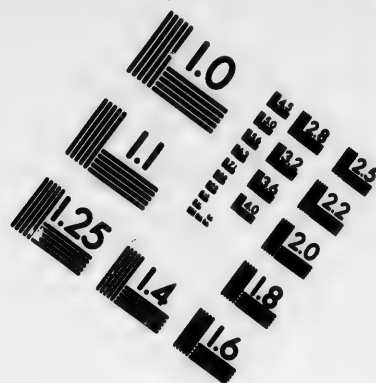
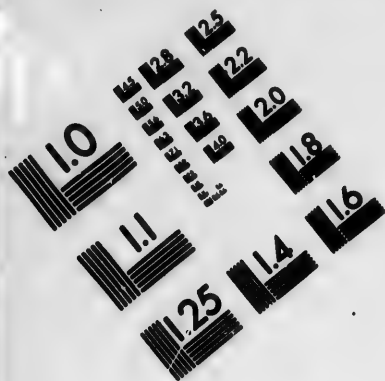
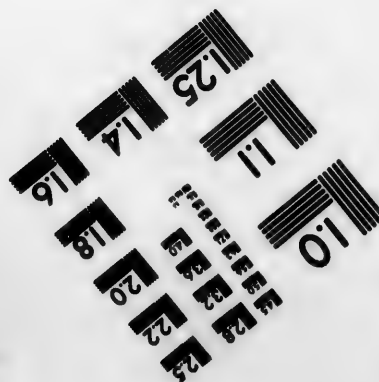
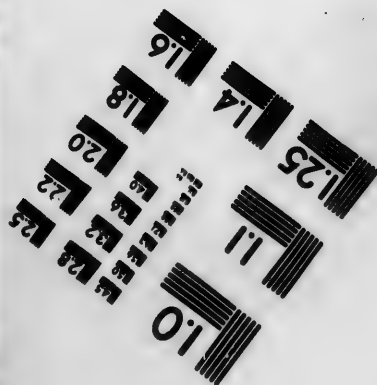
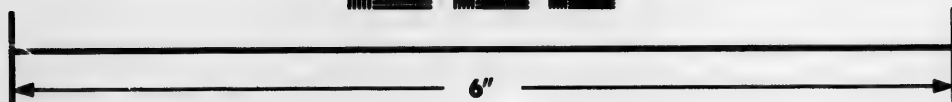
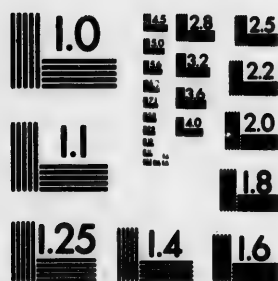


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or doing business in those other States. But how is the merchant or manufacturer to secure such orders? If he may be taxed by such States for doing so, who shall limit the tax? It may amount to prohibition. To say that such a tax is not a burden upon interstate commerce, is to speak, at least unadvisedly and without due attention to the truth of things." P. 494, L. ed. 696, Inters. Com. Rep. 47, Sup. Ct. Rep. 594.

The scope of this argument is that, inasmuch as interstate commerce can only be regulated by Congress, and is free from State interference, State legislation, although not directly prohibiting interstate commerce, if in substance and effect directly casting a burden thereon, cannot be sustained. Or, in other words, constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by any legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.

In *Monongahela Nav. Co. v. United States*, 148 U. S. 312 (37 L. ed. 463, 13 Sup. Ct. Rep. 622), it appeared that Congress had passed an Act authorizing the condemnation of a lock and dam known as the upper lock and dam on the Monongahela River, belonging to the navigation company, with a proviso "that in estimating the sum to be paid by the United States the franchise of said corporation to collect tolls shall not be considered or estimated;" the idea being that simply the value of the tangible property was all that need be paid for; and it was held that such proviso could not be sustained; that while the right of condemnation was clear, it was limited by the clause in the Fifth Amendment, "nor shall private property be taken for public use without just compensation," and that that language required payment of the entire value of the property of which the owner was deprived; the court saying:

"Congress has supreme control over the regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish postoffices and post roads; but if Congress wishes to take private property upon which to build a post-

office, it must either agree upon a price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the State, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a postoffice is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property taken, there can be as little doubt. If a man's house must be taken, that must be paid for; and if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation." P. 336, L. ed. 471, 13 Sup. Ct. Rep. 630.

In short, the court held in that case that Congress could not by any declaration in its statute avoid, qualify, or limit the special restriction placed upon its power, but that it must be enforced according to its letter and spirit and to the full extent.

In *Boyd v. United States*, 116 U. S. 616 (29 L. ed. 746, 6 Sup. Ct. Rep. 524), the 5th section of the Act of June 22, 1874 (18 Stat. 186), which authorized a court of the United States in revenue cases, on motion of the District Attorney, to require the defendant or the claimant to produce in court his private books, invoices, and papers, or else that the allegations of the attorney as to their contents should be taken as confessed, was held unconstitutional and void as applied to an

action for penalties or to establish a forfeiture of the party's goods, because repugnant to the Fourth and Fifth Amendments to the Constitution. The case is significant, for the statute was not so much in conflict with the letter as with the spirit of the restrictive clauses of those Amendments, and in respect to this the Court said:

"Though the proceeding in question is divested of many of the aggregating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*." P. 635 (29 L. ed. 753, 3 Sup. Ct. Rep. 535).

On the other hand, *Pace v. Burgess*, 92 U. S. 372 (23 L. ed. 657), is cited as an authority against these conclusions; but an examination of the case shows that this is a mistake. The Act of 1868 (15 Stat.) imposed certain taxes on the manufacture of tobacco for consumption or use, required as evidence of the payment of such taxes the affixing of revenue stamps to the packages, and forbade the removal of any tobacco from the factory without payment of the taxes and affixing of the stamps. It further provided that tobacco might be manufactured for export and exported without payment of any tax. Sections 73 and 74, page 157, are the sections making provision for such export, and authorized the removal of the tobacco from the manufactory to certain designated warehouses at ports of entry upon the giving of suitable bonds. The latter part of § 74 reads:

"All tobacco and snuff intended for export, before being removed from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, to be pro-

vided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps, twenty-five cents for each package so stamped shall be paid to the Collector on making the entry for such transportation."

This Act was amended in 1872 (17 Stat. 230), the amendments to § 73 and § 74 being found on page 254; but they have no significance in respect to the present question. Now, it was the cost of those removal stamps which was complained of as in conflict with the constitutional provision against a tax or duty upon exports, but the contention was overruled, the Court saying (pp. 374, 375, 376, L. ed. 658, 659):

"The plaintiff contends that the charge for the stamps required to be placed on packages of manufactured tobacco intended for exportation was and is a duty on exports, within the meaning of that clause in the Constitution of the United States which declares that 'no tax or duty shall be laid on articles exported from any State.' But it is manifest that such was not its character or object. The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud and secure the faithful carrying out of the declared intent with regard to the tobacco so marked * * * We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned; and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and precaution were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the Government from imposition and fraud likely to be committed under pretense of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one, but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. The point to guard against is the imposition of a duty under the pretext of fixing a fee. In the case under consideration, hav-

ing due regard to that latitude of discretion which the Legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the Government.

"One cause of difficulty in the case arises from the use of stamps as one of the means of segregating and identifying the property intended to be exported. It is the form in which many taxes and duties are imposed and liquidated; stamps being seldom used except for the purpose of levying a duty or tax. But we must regard things rather than names. A stamp may be used, and, in the case before us we think it is used, for quite a different purpose from that of imposing a tax or duty; indeed, it is used for the very contrary purpose—that of securing exemption from a tax or duty. The stamps required by recent laws to be affixed to all agreements, documents, and papers, and to different articles of manufacture, were really and in truth taxes and duties, or evidences of the payment of taxes and duties, and were intended as such. The stamp required to be placed on gold-dust exported from California by a law of that State was clearly an export tax, as this court decided in the case of *Almy v. California*, 24 How. 169 (16 L. ed. 644). In all such cases no one could entertain a reasonable doubt on the subject."

Obviously, this opinion, taken as a whole, makes against, rather than in favor of, the contention of counsel for the Government. Its argument is to the effect that the stamp required was in no proper sense a tax for revenue; that there was no burden of any kind on the export; that it was something to facilitate, rather than to hinder, exports; that it was only a means of identification and to enable parties to remove their tobacco from the manufactory to the warehouse, and that the sum demanded was simply a matter of compensation for services rendered. The statute itself declared that the twenty-five cents was to be paid "for the expense attending the providing and affixing" of the stamps. This clearly excludes the idea that any tax or duty was intended to be imposed, and the

opinion notes the fact that the difficulty arises because ordinarily stamps are used for the purpose of duty or tax, says that we must always regard things rather than names, and that this stamp was not used for the purpose of tax or duty, but only for identification and to prevent frauds on the Government. If it had been supposed that a stamp tax could properly be charged, the line of argument would have been entirely different. In the case before us the stamp is distinctly for the purpose of revenue, and not by way of compensation for services rendered, so that the question is whether revenue can be collected from exports by changing the form of the tax from a tax on the article exported to a tax on the bill of lading which evidences the export.

Again, it is said that if this stamp duty on foreign bills of lading cannot be sustained it will follow that tonnage taxes and stamp duties on manifests must also fall. The validity of such taxes is not before us for determination, and therefore we must decline to express any opinion thereon, and yet it may be not improper to say that, even if the suggested result should follow, it furnishes no reason for not recognizing that which, in our judgment, is the true construction of the constitutional limitation. Mingling in one statute two or three unconstitutional taxes cannot be held operative to validate either one, and if the reasoning we have stated and followed in reaching the conclusion in this case shall also lead to the result that such taxes are invalid, it of itself does not weaken the force of the reasoning or justify us in departing from its conclusions. But we may be permitted to suggest, without deciding, that there may be a valid difference as indicated by the decisions of this court in respect to interstate commerce. It has been distinctly held that no State could by a license or otherwise impose a burden on the business of interstate commerce. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34 (29 L. ed. 785, 6 Sup. Ct. Rep. 635), and cases cited in the opinion. And yet that decision was followed by decisions that it might tax the vehicles and property employed in interstate commerce so long and so far as they were a part of the property of the State. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18 (35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876), and cases cited in the opinion. This difference may have significance in respect to these other taxes. As here-

tofore said, we do not decide the question, but only make these suggestions to indicate that the matter has been considered.

Another matter pressed upon our attention, which deserves and has received careful consideration, is the practical construction of this constitutional provision by legislative action. On July 6, 1797, an Act was passed entitled, "An Act Laying Duties on Stamped Vellum, Parchment, and Paper" (1 Stat. 527), which contained this clause:

"Any note or bill of lading, for any goods or merchandise to be exported, if from one district to another district of the United States, not being in the same State, ten cents; if to be exported to any foreign port or place, twenty-five cents," etc., p. 528.

This was changed by the Act of February 28, 1799 (1 Stat. 622), but only as to the amount. On April 6, 1802 (2 Stat. 148), a repealing Act was passed. Again, on July 1, 1862 (12 Stat. 432), a similar stamp duty was imposed on foreign bills of lading, which was continued by the Act of June 30, 1864 (13 Stat. 218, 291), finally repealed by the Act of June 6, 1872 (17 Stat. 230, 256), and then followed the Act in question. In *Knowlton v. Moore, supra*, in which the inheritance tax was considered, the significance of this practical construction by legislative action was referred to, and on pages 56, 57 (L. ed. 976, Sup. Ct. Rep. 753, 754), we said:

"The Act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our Government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention which framed the Constitution must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within State authority. It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and although their constitutionality was assailed on

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other grounds held unsound by this Court, the question of the want of authority of Congress to levy a tax on inheritances and legacies was never urged against the Acts in question."

And again, when the construction of the uniformity clause was being considered (p. 92, L. ed. 990, Sup. Ct. Rep. 767):

"But one of the most satisfactory answers to the argument that the uniformity required by the Constitution is the same as the equal and uniform clause which has since been embodied in so many of the State Constitutions, results from a review of the practice under the Constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts, and excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced."

That was not the first case in which this matter has been considered by this Court. On the contrary, it has been often presented. See in the margin a partial list of cases in which the subject has been discussed.* An examination of the opin-

**Stuart v. Laird*, 1 Cranch, 299, 2 L. ed. 115; *Martin v. Hunter*, 1 Wheat. 304, 351, 4 L. ed. 97, 109; *Cohen v. Virginia*, 6 Wheat. 264, 418, 5 L. ed. 257, 294; *Edwards v. Darby*, 12 Wheat. 206, 210, 6 L. ed. 603, 604; *United States v. State Bank of North Carolina*, 6 Pet. 29, 39, 8 L. ed. 308, 311; *United States v. Macdaniel*, 7 Pet. 1, 15, 8 L. ed. 587, 592; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060; *Union Ins. Co. v. Hoge*, 21 How. 35, 66, 16 L. ed. 61, 68; *United States v. Alexander*, 12 Wall. 177, 181, *sub nom. United States v. Mayes*, 20 L. ed. 381, 382; *Peabody v. Stark*, 16 Wall. 240, 243, *sub nom. Peabody v. Draughn*, 21 L. ed. 311, 313; *Dollar Sav. Bank v. United States*, 19 Wall. 227, 237, 22 L. ed. 80, 81; *Smythe v. Fiske*, 23 Wall. 374, 382, 23 L. ed. 47, 49; *United States v. Moore*, 95 U. S. 760, 763, 24 L. ed. 588, 589; *Swift Co. v. United States*, 105 U. S. 691, 695, 26 L. ed. 1108, 1109; *Hahn v. United States*, 107 U. S. 402, 406, 27 L. ed. 527, 528, 2 Sup. Ct. Rep. 494; *United States v. Graham*, 110 U. S. 219, 221, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *Lithographic Co. v. Sarony*, 111 U. S. 53, 57, 28 L. ed. 349, 351, 4 Sup. Ct. Rep. 279; *Brown v. United States*, 113 U. S. 568, 571, 28 L. ed. 1079, 1080, 8 Sup. Ct. Rep. 648; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733, 28 L. ed. 1137, 1138, 5 Sup. Ct. Rep. 739; *The Laura*, 114 U. S. 411, 416, *sub nom. Pollock v. Bridgeport S. B. Co.* 29 L. ed. 147, 148, 5 Sup. Ct. Rep. 881; *United States v. Philbrick*, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; *United States v. Hill*, 120 U. S. 169, 182, 30 L. ed. 627, 632, 7 Sup. Ct. Rep. 510; *United States v. Johnston*, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; *Robertson v. Downing*, 127 U. S. 607, 613, 32 L. ed. 269, 271, 8 Sup.

ions in those cases will disclose that they may be grouped in three classes: First, those in which the Court, after seeking to demonstrate the validity or the true construction of a statute, has added that, if there were doubt in reference thereto, the practical construction placed by Congress or the department charged with the execution of the statute was sufficient to remove the doubt; second, those in which the Court has either stated or assumed that the question was doubtful, and has rested its determination upon the fact of a long-continued construction by the officials charged with the execution of the statute; and, third, those in which the Court, noticing the fact of a long-continued construction, has distinctly affirmed that such construction cannot control when there is no doubt as to the true meaning of the statute.

The first class is illustrated by *Cohen v. Virginia*, 6 Wheat. 264 (5 L. ed. 257). There the question presented was the jurisdiction of this Court over proceedings by indictment in a State court for a violation of a State statute. In an elaborate argument Chief Justice Marshall sustained the jurisdiction, and then added (p. 418, L. ed. 294):

"Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration."

And in support of that, referred to the writings in the *Federalist*, which were presented before the adoption of the Constitution, and were generally recognized as powerful arguments in its favor; also to the Judiciary Act of 1789 (1 Stat. 73), the decisions of this Court, and the assent of the courts of several States thereto, saying (p. 421 L. ed. 295):

Ct. Rep. 1328 *Merritt v. Cameron*, 137 U. S. 542, 552, 34 L. ed. 772, 776, 11 Sup. Ct. Rep. 174, *Schell v. Fauche*, 138 U. S. 562, 570, 34 L. ed. 1040, 1042, 11 Sup. Ct. Rep. 376 *United States v. Alabama R. Co.* 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306; *McPherson v. Blacker*, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; *United States v. Tanner*, 147 U. S. 661, 663, 37 L. ed. 321, 322, 13 Sup. Ct. Rep. 436; *United States v. Union P. R. Co.* 148 U. S. 562, 572, 37 L. ed. 560, 563, 13 Sup. Ct. Rep. 724; *United States v. Alger*, 152 U. S. 384, 397, 38 L. ed. 488, 14 Sup. Ct. Rep. 635; *Webster v. Luther*, 163 U. S. 331, 342, 41 L. ed. 179, 182, 16 Sup. Ct. Rep. 963; *Wisconsin C. R. Co. v. United States*, 164 U. S. 190, 205, 41 L. ed. 399, 404, 17 Sup. Ct. Rep. 45; *Hewitt v. Schultz*, 180 U. S. 139-156, 45 L. ed. —, 21 Sup. Ct. Rep. 309.

"This concurrence of statesmen, of legislators, and of judges in the same construction of the Constitution may justly inspire some confidence in that construction."

Again, in *United States v. State Bank of North Carolina*, 6 Pet. 29, 39 (8 L. ed. 308, 311), Mr. Justice Story, in like manner, said:

"It is not unimportant to state that the construction which we have given to the terms of the Act is that which is understood to have been practically acted upon by the Government, as well as by individuals, ever since its enactment. Many estates, as well of deceased persons, as of persons insolvent who have made general assignments, have been settled upon the footing of its correctness. A practice so long and so general would, of itself, furnish strong grounds for a liberal construction, and could not now be disturbed without introducing a train of serious mischiefs. We think the practice was founded in the true exposition of the terms and intent of the Act, but if it were susceptible of some doubt, so long an acquiescence in it would justify us in yielding to it as a safe and reasonable exposition."

In the second class may be placed *Stuart v. Laird*, 1 Cranch, 299 (2 L. ed. 115); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53 (28 L. ed. 349, 4 Sup. Ct. Rep. 279), in which last case Mr. Justice Miller, speaking for the court, used this language (p. 57, L. ed. 351, Sup. Ct. Rep. 381):

"The construction placed upon the Constitution by the first Act of 1790, and the Act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive."

See also *The Laura*, 114 U. S. 411 (sub. nom. *Pollock v. Bridgeport S. B. Co.*, 29 L. ed. 147, 5 Sup. Ct. Rep. 881); *United States v. Philbrick*, 120 U. S. 52, 59 (30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413); *United States v. Hill*, 120 U. S. 169, 182 (30 L. ed. 627, 632, 7 Sup. Ct. Rep. 510); *Robertson v. Downing*, 127 U. S. 607, 613 (32 L. ed. 269, 271, 8 Sup. Ct. Rep. 1328); and *Schell v. Fauche*, 138 U. S. 562, 572 (34 L. ed. 1040, 1043, 11 Sup. Ct. Rep. 376, 380), in which it was said:

"In all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments, and even of the officials whose duty it is to carry the law into effect, is universally held to be controlling."

The third class is the largest. While the language used by the several justices announcing the opinions in these cases is not the same, the thought is alike. Thus, in *Swift & C. & B. Co. v. United States*, 105 U. S. 691, 695 (26 L. ed. 1108, 1109), Mr. Justice Matthews said:

The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution applies only in cases of ambiguity and doubt."

In *United States v. Graham*, 110 U. S. 219, 221 (28 L. ed. 126, 3 Sup. Ct. Rep. 582, 583), Chief Justice Waite thus stated the law:

"Such being the case, it matters not what the practice of the departments may have been or how long continued, for it can only be resorted to in aid of interpretation, and 'it is not allowable to interpret what has no need of interpretation.' If there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling in its effect. But with language clear and precise, and with its meaning evident, there is no room for construction, and consequently no need of anything to give it aid. The cases to this effect are numerous."

In *United States v. Tanner*, 147 U. S. 661, 663 (37 L. ed. 321, 322, 13 Sup. Ct. Rep. 436, 437), it was said by Mr. Justice Brown:

"If it were a question of doubt, the construction given to this clause prior to October, 1885, might be decisive; but, as it is clear to us that this construction was erroneous, we think it is not too late to overrule it. *United States v. Graham*, 110 U. S. 219 (28 L. ed. 126, 3 Sup. Ct. Rep. 582); *Swift & C. & B. Co. v. United States*, 105 U. S. 691 (26 L. ed. 1108). It is only in cases of doubt that the construction given to an Act by the department charged with the duty of enforcing it becomes material."

In *United States v. Alger*, 152 U. S. 384, 397 (38 L. ed. 488, 14 Sup. Ct. Rep. 635), Mr. Justice Gray used this language:

"If the meaning of that Act were doubtful, its practical

construction by the Navy Department would be entitled to great weight. But as the meaning of the statute, as applied to these cases, appears to this Court to be perfectly clear, no practice inconsistent with that meaning can have any effect."

In *Webster v. Luther*, 163 U. S. 331, 342 (41 L. ed. 179, 182, 16 Sup. Ct. Rep. 963, 967), Mr. Justice Harlan stated the rule in these words:

"The practical construction given to an Act of Congress fairly susceptible of different constructions, by one of the executive departments of the Government, is always entitled to the highest respect, and in doubtful cases should be followed by the courts, especially when important interests have grown up under the practice adopted. *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 34 (39 L. ed. 601, 610, 15 Sup. Ct. Rep. 508); *United States v. Healey*, 160 U. S. 136, 141 (40 L. ed. 369, 371, 16 Sup. Ct. Rep. 247). But this Court has often said that it will not permit the practice of an executive department to defeat the obvious purpose of a statute."

From this *resume* of our decisions it clearly appears that practical construction is relied upon only in cases of doubt. We have referred to it when the construction seemed to be demonstrable, but then only in response to doubts suggested by counsel. Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was no doubt we have steadfastly declined to recognize any force in practical construction. Thus, before any appeal can be made to practical construction, it must appear that the true meaning is doubtful.

We have no disposition to belittle the significance of this matter. It is always entitled to careful consideration, and in doubtful cases will, as we have shown, often turn the scale; but when the meaning and scope of a constitutional provision are clear it cannot be overthrown by legislative action, although several times repeated and never before challenged. It will be perceived that these stamp duties have been in force during only three periods: First, from 1797 to 1802; second, from 1862 to 1872; and, third, commencing with the recent statute of 1898. It must be borne in mind also in respect to this matter, that during the first period exports were limited and the amount of the stamp duty was small, and that during the

second period we were passing through the stress of a great civil war, or endeavoring to carry its enormous debt; so that it is not strange that the legislative action in this respect passed unchallenged. Indeed, it is only of late years, when the burdens of taxation are increasing by reason of the great expenses of Government, that the objects and modes of taxation have become a matter of special scrutiny. But the delay in presenting these questions is no excuse for not giving them full consideration and determining them in accordance with the true meaning of the Constitution.

Without enlarging further on these matters, we are of opinion that a stamp tax on a foreign bill of lading is in substance and effect equivalent to a tax on the articles included in that bill of lading, and therefore a tax or duty on exports, and in conflict with the constitutional prohibition. The judgment of the District Court will be reversed, and the case remanded, with instructions to grant a new trial.

MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE GRAY, MR. JUSTICE WHITE and MR. JUSTICE McKENNA) dissenting:

By the Act of June 13th, 1898, chap. 448, imposing certain stamp duties, it was declared that there should be levied, collected, and paid the sum of *ten cents* "*for and in respect of the vellum, parchment, or paper upon which * * * shall be written or printed by any person or persons or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, * * * bills of lading or receipt (other than charter party) for any goods, merchandise, or effects to be exported from a port or place in the United States to any foreign port or place. * * * Provided, That the stamp duties imposed by the foregoing Schedule on manifests, bills of lading, and passage tickets shall not apply to steamboats or other vessels plying between ports of the United States and ports in British North America.*" 30 Stat. 448, 451, 458, 459, 462, § 6 and § 24, Schedule A.

It is contended that this stamp duty is forbidden by the clause of the Constitution declaring that "no tax or duty shall be laid on any *articles* exported from any State" (Art. 1, § 9); and that the stamp duty here in question was, within the meaning of that instrument, a tax or duty on the wheat received by

the Northern Pacific Railway Company to be carried from Minnesota to Liverpool, and for which the company issued its bill of lading.

We are of opinion that this contention cannot be sustained without departing from a rule of constitutional construction by which this court has been guided since the foundation of the Government. Let us see to what extent Congress has exercised the power now held not to belong to it under the Constitution.

As early as July 6th, 1797, Congress passed an act entitled "An Act Laying Duties on Stamped Vellum, Parchment, and Paper." By the 1st section of that Act it was provided that from and after the 31st day of December thereafter there should be "levied, collected, and paid throughout the United States the several stamp duties following, to-wit: For every skin or piece of vellum, or parchment, or sheet or piece of paper upon which shall be written or printed any or either of the instruments or writings following, to-wit: * * * Any note or bill of lading for any goods or merchandise * * * to be exported to any foreign port or place, twenty-five cents." 1 Stat. 527, 528, chap. 11, § 1. The same Act provided: "That if any person or persons shall write or print, or cause to be written or printed, upon any unstamped vellum, parchment, or paper (with intent fraudulently to evade the duties imposed by this Act), any of the matters and things for which the said vellum, parchment, or paper is hereby charged to pay any duty, or shall write or print, or cause to be written or printed, any matter or thing upon any vellum, parchment, or paper that shall be marked or stamped for any lower duty than the duty by this Act payable, such person so offending shall for every such offense forfeit the sum of one hundred dollars." 1 Stat. 527-528, chap. 11 § 13.

By an Act approved December 15, 1797, chap. 1, it was provided that the duties prescribed by the Act of July 6, 1797, should be levied, collected, and paid from and after June 30, 1798, and not before. 1 Stat. 536.

The above Act of July 6, 1797, was amended in certain particulars by an Act approved March 19, 1798, chap. 20, by which certain provisions were made for furnishing the vellum, parchment, or paper required by the former Act to be stamped and marked. 1 Stat. 545.

It not having occurred to any of the great statesmen and jurists who were connected with the early history of the Government that enactments such as that of July 6, 1797, violated the Constitution, Congress passed another Act on the 28th day of February, 1799, chap. 17, imposing a duty of 10 cents "on every skin or piece of vellum or parchment on which shall be written or printed any or either of the instruments following, to-wit: * * * Any not or bill of lading, or writing or receipt in the nature thereof, for any goods or merchandise * * * to be exported to any foreign port or place." 1 Stat. 622.

Congress, still supposing that it was acting within the limits of its powers under the Constitution, again, by the Act of April 23, 1800, chap. 31, amended and extended that of July 6, 1797. By the latter Act a general stamp office was established, and provision was made, among other things, for the punishment, by fine and imprisonment, of those who, with the intent to defraud the United States of any of the duties laid by the original Act of 1797, counterfeited or caused to be forged or counterfeited, any vellum, parchment, or paper provided for by Congress under that Act. 2 Stat. L. 40, 42. The Act of April 23, 1800, was amended by an Act passed March 3d, 1801, chap. 19, by which it was provided that deeds, instruments or writings issued without being stamped could be thereafter stamped and become valid and available as if they had been originally stamped, as required by law. 2 Stat. 109.

By an Act approved April 6, 1802, chap. 19, internal duties on "stamped vellum, parchment, and paper" were discontinued—for the reason, doubtless, that the further imposition of such duties was unnecessary. 2 Stat. L. 148.

As late as March 3, 1823, Congress passed a general statute in execution of the Act of April 23, 1800, establishing a general stamp office. 3 Stat. L. 779.

By an Act, approved July 1, 1862, chap. 119, Congress provided that there should be levied, collected and paid a stamp duty of 10 cents "for or in respect of the vellum, parchment, or paper" upon which was written or printed any "bill of lading or receipt (other than charter party) for any goods, merchandise, or effects to be exported from a port or place in the United States to any foreign port or place." 12 Stat. 432, 475, 479, 480, § 94, § 110. By the Act of June 30, 1864, chap. 173, the

stamp duties provided by the Act of July 1, 1862, were continued in force until August 1, 1864, and it was provided that from and after the latter date there should be levied, collected and paid a stamp duty of 10 cents "for and in respect of the vellum, parchment, or paper upon which shall be written or printed" any "bill of lading or receipt (other than charter party) for any goods, merchandise, or effects to be exported from a port or place in the United States to any foreign port or place." 13 Stat. L. 223, 291, 292, 298, § 151, § 170, Schedule B. But by an Act approved June 6, 1872, chap. 315, all the taxes imposed under and by virtue of Schedule B of § 170 of the Act of June 30, 1864, and the several acts amendatory thereof, were abrogated from and after October 1, 1872, excepting only the tax of 2 cents on bank checks, drafts, or orders. 17 Stat. 230, 256.

We have referred somewhat in detail to the above enactments for the purpose of bringing out clearly the fact that stamp duties were imposed specifically for and in respect of the vellum, parchment, or paper upon which was written or printed a bill of lading for goods or merchandise to be exported to foreign countries, and had no reference to the kind, quality, or value of the property covered by such bill of lading. Congress *ex industria* declared in each Act that the tax was for and in respect of the vellum, parchment, or paper upon which the bills of lading were written or printed. This fact plainly distinguishes the present case from *Almy v. California*, 24 How. 169 (16 L. ed. 644), which involves the validity, under the Constitution of the United States, of a statute of California passed April 26, 1858, imposing a stamp tax on bills of lading for the transportation from that State, to any port or place without the State, of any quantity of gold or silver coin, in whole or in part, gold dust, or gold or silver in bars or other form. This court, after observing that a tax laid on the gold or silver exported from California was forbidden by the clause declaring that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws," said: "In the case now before the court, the intention to tax the exports of gold and silver, in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only upon bills of lading of gold and silver, and not upon

articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax on the gold and silver exported, while all other articles were exempted from the charge. If it was intended merely as a stamp duty on a particular description of paper, the bill of lading of any other cargo is in the same form, and executed in the same manner and for the same purposes, as one for gold and silver, and, so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other. In the judgment of this court the State tax in question is a duty upon the export of gold and silver, and consequently repugnant to the clause in the Constitution hereinbefore referred to." This interpretation was demanded by the words of the statute of California, which provided: "The following duty or stamp tax is hereby imposed on every sheet or piece of paper, parchment, or other material upon which may be written, printed, engraved, or lithographed, or other means of designation, of either of the following-described instruments, to-wit: Any bill of lading contract, agreement, or obligation for the transportation or conveyance from any point or place in this State to any point or place without the limits of this State, of any sum, amount, or quantity of gold or silver coin in bars or other form, by or between any person or persons, firm or firms, corporation or corporations, or other associations, either as principal or agent, or attorney or consignee, or consignor, to-wit: *For one hundred dollars, thirty cents; and all sums over one hundred dollars, a stamp tax or duty of one-fifth of one per cent upon the amount or value thereof*, the payment whereof to be included in the bill of lading, contract, or agreement, or obligation for the transportation or conveyance thereof, as in this section provided, having attached thereto or stamped thereon a stamp or stamps expressing in value the amount of such tax duty," etc. Sta. Cal. 1858, p. 305; *id.* 1857, p. 304.

The difference between the California statute and the Act of Congress is manifest. By the former the amount of tax upon bills of lading depended upon the value of the gold or silver specified in them, and exported, while the latter imposed a tax of only 10 cents on the vellum, parchment, or paper upon which was written or printed a bill of lading for property to be exported, without regard to its quantity or value.

If Congress had graduated the stamp duty according to the quantity or value of the articles exported, there might have been ground for holding that the purpose and the necessary result was to tax the property, and not the vellum, parchment, or paper on which the bill of lading was written or printed.

This rule of interpretation was recognized in *Pace v. Burgess*, 92 U. S. 372, 375 (23 L. ed. 657, 659). That case arose under the Act of July 20, 1868, chap. 176, imposing duties on distilled spirits and tobacco, and for other purposes, and which provided that "all tobacco and snuff intended for export, before being removed from the manufactory, shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors, as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending the providing and affixing such stamps, twenty-five cents for each package so stamped shall be paid to the collector on making the entry for such transportation." 15 Stat. 125, 158, § 74. The contention was that the statute imposed a tax or duty in violation of the constitutional prohibition of taxes or duties "on any articles exported from any State." Art. 1, § 9. This court overruled that contention upon the ground that it was apparent from the statute that "the stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of 25 cents or of 10 cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo." The court added—and this is important in its bearing on the case before us: "It (the stamp) bore *no proportion whatever to the quantity or value of the package on which it was affixed*. These were unlimited, except by the discretion of the exporter or the convenience of handling. The large amount paid for such stamps by the plaintiff only shows that he was carrying on an immense business." As in *Pace v. Burgess*, so in the present case, the stamp duty imposed was without any reference to the quantity or value of the property.

In our judgment, the small stamp duty imposed by the Act of 1898 specifically upon the vellum, parchment, or paper upon which was written or printed a bill of lading for property, of whatever value, intended for export, cannot be regarded as a duty on the property itself.

It is said that the power to tax is the power to destroy, and that if Congress can impose a stamp tax of 10 cents upon the vellum, parchment, or paper on which is written a bill of lading for articles to be exported from a State, it could as well impose a duty of \$5,000, and thereby indirectly tax the articles intended for export. That conclusion would by no means follow. A stamp duty has now, and has had for centuries, a well-defined meaning. It has always been distinguished from an ordinary tax measure by the value or kind of the property taxed. If Congress, in respect of a bill of lading for articles to be exported, had imposed a tax of \$5,000 for and in respect of the vellum, parchment, or paper upon which such bill was written, the courts, looking beyond form and considering substance, might well have held that such an Act was contrary to the settled theory of stamp-tax laws, and that the purpose and necessary operation of such legislation was, in violation of the Constitution, to tax the articles specified in such bill, and not to impose simply a stamp duty. Here, the small duty imposed, without reference to the kind, quantity, or value of the articles exported, renders it certain that when Congress imposed such duty specifically on the vellum, parchment, or paper upon which the bill of lading was written or printed, it meant what it so plainly said; and no ground exists to impute a purpose by indirection to tax the articles exported.

There is another view of this case which presents considerations of a serious character. In the opinion just rendered it is conceded that a stamp tax on vellum, parchment, or paper on which is printed or written a bill of lading of goods to be shipped out of the United States could be sustained if regard be had to the practice of the Government since its organization. But that practice, covering more than a century, must, it seems, go for naught.

In *Stuart v. Laird* (1803) 1 Cranch, 299, 309 (2 L. ed. 115, 118), the question arose whether the justices of this court had the right, although authorized by an Act of Congress, to sit as circuit judges, not having been appointed

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as such nor having any distinct commissions for that purpose. This court, speaking by Mr. Justice Patterson, said: "To this objection, which is of recent date, it is sufficient to observe, that *practice and acquiescence under it* for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed *fixed the construction*. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is *at rest*, and ought not now to be disturbed."

In *Prigg v. Pennsylvania*, 16 Pet. 541, 608, 621 (10 L. ed. 1061, 1086, 1091), this court, speaking by Mr. Justice Story, after referring to the section of the Act of February 12, 1793, requiring a certificate to be given, under certain circumstances, to the owner of a fugitive slave apprehended under that Act, said: "So far as the judges of the courts of the United States have been called upon to enforce it and to grant the certificate required by it, it is believed that it has been uniformly recognized as a binding and valid law, and as imposing a constitutional duty. Under such circumstances, if the question were one of doubtful construction, such long acquiescence in it, such contemporaneous expositions of it, and such extensive and uniform recognition of its validity, would, in our judgment, entitle the question to be considered at rest; unless, indeed, the interpretation of the Constitution is to be delivered over to interminable doubt throughout the whole progress of legislation and of national operations. Congress, the executive, and the judiciary have, upon various occasions, acted upon this as sound and reasonable doctrine,"—citing, among other cases, that of *Stuart v. Laird*, 1 Cranch, 299 (2 L. ed. 115).

In *The Laura*, 114 U. S. 411, 416 (*sub nom. Pollock v. Bridgeport S. B. Co.* 29 L. ed. 147, 148, 5 Sup. Ct. Rep. 881, 883), in which the question arose as to the validity of an Act of Congress approved March 3d, 1797 (1 Stat. 506, chap. 13), authorizing the Secretary of the Treasury to remit a forfeiture of property after final sentence of condemnation, this court said: "Touching the objection now raised as to the constitutionality of the legislation in question, it is sufficient to say, as was said in an early case, that the practice and acquiescence under it, 'commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed

the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.' *Stuart v. Laird*, 1 Cranch, 308 (2 L. ed. 118). The same principle was announced in the recent case of *Burrow-Giles Lithographic Co. v. Sarony*, 111 U. S. 53 (57, 28 L. ed. 349, 351, 4 Sup. Ct. Rep. 279, 281), where a question arose as to the constitutionality of certain statutory provisions reproduced from some of the earliest statutes enacted by Congress. The court said: 'The construction placed upon the Constitution by the first Act of 1790 and the Act of 1802, by the men who were contemporary with its formation, many of whom were members of the Convention which framed it, is, of itself, entitled to very great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is (almost) *conclusive*.' This quotation in *The Laura* from the opinion in *Sarony's Case* was defective in that it omitted, by mistake in printing, the word "almost" before "conclusive." But the error does not affect the substance of the decision rendered, as the Court, in the case of *The Laura*, approved and reaffirmed what was said in *Stuart v. Laird*.

In *Schell, etc., v. Fauche*, 138 U. S. 562 (34 L. ed. 1040, 11 Sup. Ct. Rep. 376), this Court, speaking by Mr. Justice Brown, cited with approval what is above quoted from *Stuart v. Laird*, adding: "In all cases of ambiguity, the contemporaneous construction, not only of the courts, but of the departments, and even of the officers whose duty it is to carry the law into effect, is universally held to be *controlling*."

In *McPherson v. Blacker*, 146 U. S. (27, 36 L. ed. 869, 874, 13 Sup. Ct. Rep. 3, 7), this Court, speaking by the present Chief Justice, said: "The framers of the Constitution employed words in their natural sense; and where they are plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction, are entitled to the greatest weight. Certainly, plaintiffs in error cannot reasonably assert that the clause of the Constitution under consideration so plainly sustains their posi-

tion as to entitle them to object that contemporaneous history and practical construction are not to be allowed their legitimate force; and, conceding that their argument inspires a doubt sufficient to justify resort to the aids of interpretation thus afforded, we are of opinion that such doubt is thereby resolved against them, the *contemporaneous practical exposition of the Constitution being too strong and obstinate to be shaken or controlled*. *Stuart v. Laird*, 1 Cranch, 299, 309."

Cases almost without number could be referred to in which the same principles of constitutional construction are announced as in the cases above cited. In the latest case—*Knowlton v. Moore*, 178 U. S. 41, 56 (44 L. ed. 969, 975, 20 Sup. Ct. Rep. 747, 753)—this Court had occasion, in its review of taxing-legislation by Congress, to refer to the Act of July 6th, 1797, the very Act in which Congress first imposed a stamp duty on vellum, parchment, or paper upon which was written a bill of lading for articles to be exported. Touching the objection that Congress could not constitutionally impose, as by that Act was imposed, a tax on inheritances or legacies, this Court, speaking by Mr. Justice White, said: "It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the Government. The Act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our Government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the Convention which framed the Constitution must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed upon their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within State authority."

Many cases have been cited which hold that the uniform contemporaneous construction by *executive* officers charged with the enforcement of a *doubtful* or *ambiguous* law is entitled to great weight, and should not be overturned unless it be plainly

or obviously erroneous. If such respect be accorded to the action of mere executive officers, how much greater respect is due to the legislative department when it has, at different periods in the history of the country, exercised a power as belonging to it under the Constitution, and no one in the course of a century questioned the existence of the power so exercised. Besides, we have here a question of the constitutional power of Congress under the Constitution, and not a question relating merely to the practice of executive officers acting under a law susceptible of different interpretations. No one of the Acts of Congress imposing a stamp duty on the vellum, parchment, or paper on which a bill of lading of articles to be exported was written can be classed among laws that are doubtful or ambiguous in their meaning. No person, however skillful in the use of words, who attempted to frame a statute imposing a stamp duty, pure and simple, on such vellum, parchment, or paper, could possibly employ language expressing that thought more distinctly than Congress has done in the several acts relating to stamp duties of that character. The words of those acts are clear and are capable of but one construction; and the Court determines the case upon the ground alone of want of power in Congress to impose the stamp duty in question.

Without further discussion or citation of authorities, we submit that the denial, at this late day, of the power of Congress to impose what is strictly a stamp duty on the vellum, parchment, or paper upon which is written or printed a bill of lading for goods to be exported to a foreign port or place, involves not only a departure from canons of constitutional construction by which it has been controlled for more than a century, but, in the words of *Prigg v. Pennsylvania*, delivers the interpretation of the Constitution "over to interminable doubt throughout the whole progress of legislation and of national operations." Practically no weight has been given in the opinion just filed to the fact that the power now denied to Congress has been exercised since the organization of the Government, without any suggestion or even intimation by a single jurist or statesman during all that period that the Constitution forbade its exercise. It is said that the question of power never was presented for judicial determination prior to the present case, and therefore this Court is at liberty to determine the matter as if now for the first time presented. But the

answer to that suggestion is that, in view of the frequent legislation by Congress and its enforcement for nearly a century, the question must have arisen if it had been supposed by anyone that such legislation infringed the constitutional rights of the citizen. Within the rule announced in *Stuart v. Laird*, and in other cases, the question should be considered at rest.

In view of the importance of the case, we have deemed it appropriate to state the reasons of our dissent from the opinion and judgment just rendered.

BUEL v. STATE.

104 Wis. 132—80 N. W. Rep. 73.

Decided September 26, 1899.

CORPUS DELICTI—CIRCUMSTANTIAL EVIDENCE—HOMICIDE—EVIDENCE—PRACTICE: *Proof of corpus delicti by circumstantial evidence—Prejudicial error in admission of evidence—Cross-examination—Instructions properly refused—Vague and double-meaning instructions reversible error—Order to strike out testimony should be specific.*

1. The *corpus delicti*, and every element of it, in a criminal case may be established by circumstantial evidence as well as by positive or direct evidence, if such circumstantial evidence produces in the minds of the jury conviction, to a moral certainty, of the existence of all the requisite facts and excludes every other reasonable hypothesis.
2. The reception of irrelevant evidence against objection, prejudicial, if at all, by reason of an unwarranted use of it by counsel in addressing the jury or significance given to it by the instructions of the court, is not reversible error.
3. The right of cross-examination extends to a reasonable inquiry into the previous life and character of the witness, so far as the same bears on the credibility of his evidence, and the extent to which such examination may be carried rests in the sound discretion of the court, though it is an abuse of judicial authority to allow questions to a witness as to irrelevant matters, regardless of whether there are any circumstances reasonably suggesting them or they reasonably bear on his credibility, and for the purpose of creating, or which are manifestly calculated to create, prejudice in the minds of the jury

against the witness, and, if he be a party, influence them to find against him because of such prejudice.

4. For the purpose of explaining the circumstances that soon after a homicide for robbery the supposed guilty party was much improved financially, he testified that a few months before the homicide he and the deceased conducted a profitable partnership business; and to rebut that the court permitted a memorandum book of the deceased in evidence, saying that it tended to impeach the evidence of the accused, which book did not show, definitely, that it was other than a personal memorandum book; there was no evidence that the accused ever saw or was in any way connected with it; and it did not refer, intelligently, to any business transactions between the accused and the deceased. *Held*, prejudicial error.
5. Evidence of threats made by third persons against the deceased was properly rejected, because, it offered to show motive for his leaving the country, it was irrelevant in the absence of evidence that he had knowledge of the threats; further, there was no controversy as to the real motive, and if offered to show that some other person than the accused was the guilty party, the evidence was irrelevant and hearsay.
6. A refusal to instruct the jury on the subject of the certainty of the existence of the facts requisite to a conviction, *held* not reversible error, since the general charge contained full instructions on the subject.
7. The giving of properly worded, specific explanatory instructions on the subject of reasonable doubt at the request of the attorneys for the accused, approved and advised; but a refusal to do so, when the general charge is full and plain on the subject so as to be understood, reasonably, by persons of ordinary comprehension, *held* not reversible error.
8. The giving of special instructions on leading legal questions, as requested, or embodiment of them in the general charge, especially in an important case where such special instructions are more specific than the general charge, advised; but the refusal to do so when such general charge is sufficiently plain to be understood by persons of ordinary comprehension, *held* not error.
9. Instructions so worded as to be difficult to understand, and so worded as to admit, reasonably, of a construction that would mislead the jury on a material point, *held* reversible error.
10. A general order to strike out all the hearsay evidence admitted on a trial, made at the close of the trial, without specifying the particular evidence referred to, leaving it to the jury to determine what is and what is not hearsay evidence, *held* error. (Syllabus by the Judge.)

Supreme Court of Wisconsin.

Error to Circuit Court, Sawyer County; Hon. John K. Parish, Judge.

Eugene Buel, convicted of murder, brings error. Reversed.

J. B. Alexander and *V. W. James*, for the plaintiff in error.

C. E. Buell, First Assistant Attorney General, for the State.

MARSHALL, J. The evidence produced on the trial established or tended to establish the following:

Peter F. Nelson—an unmarried man of about 24 years of age, who had resided for a considerable length of time prior to the 17th day of September, 1896, with the plaintiff in error, *Eugene Buel*, a man of about 36 years of age, near the Indian reservation in a thinly-settled district in Saginaw County about nine miles from the village of Hayward—in August, 1896, was charged by one Wettenhall with being guilty of having sustained criminal relations with the latter's daughter, and being the cause of her supposed condition of pregnancy. That resulted in Wettenhall and Nelson meeting a day or two thereafter, by appointment, at the village of Hayward, where Wettenhall insisted on Nelson marrying the daughter, which he declined to do. Soon thereafter, on the same day, on hearing that he was about to be prosecuted respecting the charge of causing the pregnancy of the Wettenhall girl, Nelson fled from the county and thereafter remained in hiding till about the 16th day of September following, when he met *Buel*, by appointment, at a railway station a short distance from Hayward, from which point the two traveled together to Hayward, arriving there about daylight on the succeeding day. The purpose of the trip to Hayward was to enable Nelson to draw some \$400 which he had in the Sawyer County Bank and then leave the county before his presence at Hayward could become sufficiently known to lead to his arrest. Pugh, the cashier of the bank, was called upon by Nelson and *Buel* at his house before daylight on the day named and informed of the purpose of Nelson as stated, and that he intended to go to Chicago by way of Ashland. Pugh acceded to the request to immediately get the money for Nelson and to aid in keeping his presence in Hayward secret, and thereupon went to the bank and obtained such money, *Buel* and a policeman going with him, and Nelson remaining at the house. Pugh returned to his house with the

money and paid it to Nelson, whereupon the latter and *Buel* immediately departed, going in the direction of *Buel's* home. The last that was seen of Nelson alive, he was in the company of *Buel* a few miles from the latter's home on the day in question.

On the day of the occurrence related, *Buel* was observed traveling on the road from Hayward towards his home alone, carrying a satchel, and later in the day he left his home with a pail and gun under the pretense that he was going to carry a lunch to Nelson; and still later the same day he returned home in a nervous condition and reported that Nelson complained that he had been chased by Indians. After the disappearance of Nelson as related, he did not write to any of his old neighbors or acquaintances as he was accustomed to do when away from home. *Buel*, during the time Nelson lived with him, was a very poor man and a very poor provider for his family, but after the former's disappearance there was a significant change in that regard, and there were other things, such as the purchase of a tract of land by *Buel* for \$200 and various articles of personal property, indicating that he was possessed of a considerable sum of money. He took possession of all the personal effects of Nelson and treated them in every way as his own.

In July of the next year after the occurrences detailed in the foregoing, the remains of a human being were found lying on the back in a bunch of thick bushes a few miles from where Nelson was last seen with *Buel* and within about half a mile from an unoccupied homestead claim of *Buel*, and somewhat further from such a claim which belonged to Nelson. The location of the discovery was in an out-of-the-way place some four miles from any inhabited building except an old logging camp about a mile and a half away, which was occupied by a watchman. It was near an old Indian trail and the usual route from *Buel's* place of residence to his homestead claim. The fragments of the skull indicated that either before or after death it was broken in by some crushing blow or blows. The shoes were on the feet and the clothing was sufficiently preserved to show the color. No money or thing of value was found near the remains except a pocketknife, which was identified as one of two knives that had been sold by a merchant in Hayward, one of which was sold to Nelson. The trousers and shoes found on the remains were similar to those worn by Nelson.

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Evidence was produced to explain or discredit much of the evidence of the circumstantial evidentiary facts mentioned, and to impair the probative force of circumstances established pointing to the guilt of *Buel*. The jury found him guilty of murder in the first degree and judgment was entered accordingly.

The motion to acquit the plaintiff in error and the motion to set aside the verdict for want of sufficient evidence to warrant a conviction were properly denied. Upon each vital question in the case there was credible evidence tending to establish the fact involved, contradicted or explained in many instances, it is true, by other evidence, but it was for the jury to weigh all the evidence and determine where the truth lay. Such determination is conclusive, unless we can say it was not warranted in any reasonable view of the evidence, and we clearly cannot say that. True, the evidence was all circumstantial, but that does not count strongly against the conviction, since a conviction may as well rest on circumstantial evidence as on direct evidence, if it has the necessary probative power to convince the mind beyond a reasonable doubt of the existence of each of the elements requisite to make out the charge and exclude to a moral certainty every other reasonable hypothesis. If the jury believed that the knife, shoes and clothing found on the remains were those which formerly belonged to Nelson, such facts, in connection with the undisputed circumstance that he disappeared a few miles from where the remains were found and that their location was near his homestead where he was likely to have gone under the circumstances, in the absence of any satisfactory evidence that he was ever seen after the disappearance, or heard of or from, by anybody, or any evidence to suggest a probability of the remains being other than his, they might well and readily have said, as they did, that no doubt founded in reason could exist but that Nelson was dead and all that remained of his body was that discovered in the brush, as related. Having determined the initial question as indicated, that and the undisputed fact that when Nelson disappeared he had a large sum of money and probably a watch upon his person, that none of such property was found upon the remains, and that the skull was broken, in such way that if the injury were inflicted upon the person while living it necessarily caused death, certainly warranted the

jury in saying that there was no reasonable theory of the cause of death other than that some human agency produced it, and that the crime of deliberate murder was committed. Having reached that point the circumstances pointing to *Buel* as the guilty person were numerous. The fact that he was the only person known to have been in Nelson's company at about the time of the homicide, that he was the only person who knew Nelson had upon his person a large sum of money, and the further fact that his financial circumstances materially changed immediately after Nelson's disappearance, and that he appropriated all of Nelson's personal property to his own use without any satisfactory explanation of such conduct; that he pretended to have seen Nelson, and acted and talked strangely in regard to him, the day of the disappearance; and many other things which might be mentioned which appear in the evidence—if not deemed by the jury to have been satisfactorily explained so as to leave a reasonable doubt in their minds as to the existence of any such incriminating circumstances, may well have moved them to conclude, as they did, that such circumstances were consistent with the theory that *Buel* committed the homicide, and inconsistent with any other reasonable hypothesis.

The argument on this branch of the case in behalf of plaintiff in error by his counsel only brings to our attention the fact that as to many of the circumstances mentioned, the evidence was conflicting and was circumstantial. It is not claimed but that there was evidence bearing upon every essential question involved in the charge, and every one of the evidentiary facts mentioned. That being the case it was for the jury to weigh the evidence and this court cannot test their determination by its own conclusion.

It appears to be strongly urged that the verdict was not warranted by the evidence to the *corpus delicti*, because, on that subject there must be positive evidence, or circumstantial evidence of such probative power as to convince the mind beyond the possibility of error. To support that contention, *State v. Davidson*, 30 Vt. 377, was cited to our attention, where it is said that "the cases all hold that where the *corpus delicti* is attempted to be shown by circumstantial evidence, it must be positively established so as to exclude all uncertainty or doubt from the minds of the jury; not that each particular circumstance must be of that conclusive character, but all combined

must produce the same degree of certainty as positive proof." That must be construed to mean that circumstantial evidence is competent and sufficient to establish every element of the *corpus delicti* if as convincing as positive or direct evidence. It recognizes the sufficiency of circumstantial evidence, and as to each element of the subject under consideration. Certainly the learned judge did not intend to convey the meaning that the essential fact he was discussing must be established beyond the possibility of a doubt. His concluding language shows that the degree of certainty which leaves no reasonable doubt on the question is all that is required as to every element in a criminal homicide. Positive evidence, even, cannot go further than that in the practical affairs of life, and if greater certainty than that were required in a criminal prosecution, in order to warrant a conviction, punishment for crime would be well-nigh if not quite impossible, and the safety of human life be without adequate legal guardianship.

There are many authorities that might be cited to support the doctrine that positive evidence is required to establish at least the element of death by criminal means, and in many legal opinions language is used which would indicate a holding that positive evidence must go further and establish the fact of identity. In *Ruloff v. People*, 18 N. Y. 179, it was stated as the undisputed law, that no one should be convicted of murder upon circumstantial evidence unless the body of the person *supposed to have been murdered* has been found, or there be other clear, irresistible proof that *such person* is actually dead. Baron Parke, in *Reg. v. Tawell*, a case not easily found reported in the books, but referred to in Will's Circumstantial Evidence (3d ed.) 180, and contained in full in Trials for Murder by Poisoning compiled by Brown and Stuart (1883), used substantially the same language, and the conclusion was reached that as to the death of the *party supposed to have been murdered*, positive evidence is necessary. Such appears to be the fair reading of the early New York cases, but that is denied, or if not denied overruled, in more recent decisions, as will be hereafter indicated. In *People v. Bennett*, 49 N. Y. 137, the same rule was applied, the opinion distinctly stating that in the *Ruloff Case* the basis of the *corpus delicti*, that the person *alleged to have been murdered* was not found dead, was wanting. That rule, it was supposed, was crystallized into statute law by section 181

of the New York Penal Code in the following language: "No person can be convicted of murder or manslaughter unless the death of *the person alleged to have been killed* and the fact of killing by the defendant as alleged, are each established as independent facts, *the former by direct proof* and the latter beyond a reasonable doubt." But in *People v. Beckwith*, 108 N. Y. 67, 15 N. E. 53, it was held that positive evidence of facts bearing directly by way of inference on the ultimate fact to be established, satisfied the call of the statute for direct proof. There the facts established by direct evidence were quite similar in character to those here. The person supposed to have been murdered disappeared. Near where he was last seen fragments of a human body were found, on which were indications pointing to the probable means of his death, and the clothing found was testified to as that worn by the missing man. These circumstances and others, all established by direct evidence and all pointing to the existence of the ultimate fact sought for, it was said, constituted direct proof within the meaning of the statute and the rule requiring positive proof. A distinction was drawn between proof and evidence, the one being the medium of proof and the other the effect of evidence. The effect of that decision was to limit the requirement of positive evidence under the rule of the earlier decisions to evidence establishing evidentiary facts, so as to enable every element of the *corpus delicti* to be established by "circumstantial evidence" as the term is commonly understood—evidence of facts which tend to prove the ultimate fact in issue. Later, the same subject was under discussion in *People v. Palmer*, 109 N. Y. 110, 16 N. E. 529, and the idea was rejected that either the statute of New York or previous adjudications of the court required positive proof of anything but the death of a human being by criminal means. It was said that a contrary rule would put a premium on brutality and prevent the punishment of criminal homicides, for the perpetrator would have the strongest motive possible to mutilate or destroy the body of his victim so that direct evidence of identity would be impossible. The conclusion reached was that the rule requiring direct evidence only applies to the fact of the death of a human being requiring investigation, and not to the identity of the subject of the homicide, and that if there is evidence of the existence of a dead human body having a fractured skull sufficient to produce death,

accompanied by circumstances excluding all reasonable inference that it was produced by accident or suicide, the rule of requiring positive evidence as to the *corpus delicti* is satisfied. It was further said that such rule never did include identity of the victim, but left that open to either direct or circumstantial evidence. This closes the review of authorities upon which counsel for plaintiff in error rely. They really leave but the fact of death to be proved by positive evidence, and hold that the discovery of fragments of a human body under circumstances pointing beyond a reasonable doubt to criminal means as the cause of death, fully satisfies the requirement for positive proof; and that direct and positive evidence of evidentiary facts from which the main fact is inferable with a certainty that excludes to a moral certainty every other reasonable hypothesis, is positive proof.

This court has spoken in no uncertain language on the subject under consideration. No question in regard to it is open in this State. A reference to authorities elsewhere is here made because of the importance of the question in this case, and to demonstrate the universality of the doctrine here applied. In *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778, the following language was used: "The substance of the offense may be proved as well by circumstantial as by direct evidence; and further, quoting with approval from a standard text writer: "No universal and invariable rule can be laid down, and every case must depend upon its own particular circumstances; and as in all other cases the *corpus delicti* must be proved by the best evidence which is capable of being adduced, and such an amount and combination of relevant facts, whether direct or circumstantial, as will establish the imputed guilt to a moral certainty, and to the exclusion of every other reasonable hypothesis." No distinction is recognized between the different elements of a homicidal offense, as to the degree of certainty necessary to establish it, or the nature or the kind of proof required. Such is the view expressed by the text writers generally. McClain, Cr. Law, § 396; Underh. Cr. Ev. § 312; 3 Greenl. Ev. § 30; Will, Circ. Ev. 354; Bish. Cr. Proc. 1071. There are many striking illustrations of this doctrine in the books. In *Ex parte Kearny*, 55 Cal. 212, the body of the murdered man was destroyed by fire so that no part of it was ever discovered but some pieces of bone, not recognizable as

human bones. In *State v. Ah Chuey*, 14 Nev. 79, the body was destroyed by fire beyond recognition. So in *Com. v. Webster*, 5 Cush. 295, the body had been dissected and many parts of it completely destroyed, particularly the head, leaving no part that could be positively said to have been a part of the body of the supposed murdered man. In *State v. Williams*, 52 N. C. 446, shortly after the disappearance of a woman, near a point where she was likely to have been, some bones were found in the ashes of a burned log heap, and some hairpins were found likewise, similar to those she had worn. Numerous other instances might be cited where the body of the murdered person was destroyed by fire or acids or in some other way, many of which instances are referred to in Whart. Hom. § 640.

So it may be taken as the settled law that the *corpus delicti* in criminal homicide, and each element of it, may be established by circumstantial evidence, and that no greater degree of certainty is required than in regard to the fact of the guilt of the person charged. Any language in *State v. Davidson*, *supra*, indicating that the former element must be established with such certainty as to exclude any doubt on the question, is not correct. True, the initial question when criminal homicide is charged is, was a human being deprived of life by criminal means? and the next question, was he the person alleged to have been murdered? And such questions, particularly the first, because of their supreme importance, require, ordinarily, stronger evidence than the questions which follow. Such importance is obvious from the well-known fact that convictions and executions have taken place, and thereafter the persons supposed to have been murdered have been discovered alive. The more important the question in any case, the greater the proof required to establish moral certainty in the mind, but when that certainty is established, whether by circumstantial or direct evidence, the fact itself must be said to be established. Enough has been said to show that there was ample evidence in this case to go to the jury on every element of the *corpus delicti*, and that the assignments of error on that subject cannot be sustained.

The State was permitted to show against objection that after Nelson disappeared it was discovered that the charge against him, founded on the theory that the Wettenhall girl was pregnant, was without foundation. That evidence was drawn out

as a basis for a claim before the jury, as it is said, that *Buel* knew before Nelson disappeared that the latter was in no danger from the Wettenhalls, and that he purposely omitted to disclose such knowledge to his intended victim in order that he might have the benefit of Nelson's reputed departure from the county to avoid a criminal prosecution, to account for such disappearance without finger of suspicion being turned upon him; and the court submitted that theory to the jury by the charge. It seems that no proof was offered as to when the true condition of the Wettenhall girl was discovered, whether after Nelson disappeared or before, and no evidence was given that the charge against Nelson was fraudulently made, or that *Buel* was a party to a scheme to put Nelson in fear of the Wettenhalls, or the fact, if it were a fact, that Nelson was falsely charged, was known to *Buel* at any time; so the mere circumstance that it was discovered some time subsequent to the disappearance of Nelson, that the claim made by the Wettenhalls against him was false, was wholly foreign to the case and ought not to have been received, though we see no reason to claim that the mere admission of the evidence could possibly have worked prejudicially to the plaintiff in error. If he was in any way injured, it was by the use counsel for the prosecution made of the evidence in addressing the jury, and the reference to it in the instructions given by the court; that is the only prejudice seriously claimed. The difficulty of treating the matter is that the remarks of counsel were not preserved or excepted to, neither were the instructions of the court referring to the evidence excepted to. We must hold that the admission of the evidence was harmless error, and that if error was committed in the use of it, either by the attorney for the prosecution in summing up his case or by the court in instructing the jury, or both, such errors have not been preserved for consideration.

The court against objection permitted the Prosecuting Attorney on cross-examination to ask the accused these questions: "Did you have any trouble with any man there in that house while you were there?" "Do you remember of making an assault upon a man there and breaking his arm?" "Did you kill a man at Ord, Nebraska?" "Did you kill two men at Ord, Nebraska?" "State the trouble you had at Ord that caused you to leave there?" "Did the insurance company give you any reason for not giving you the insurance

money?" referring to the insurance on a house belonging to the accused which was burned. "Did you ever have any talk with any of them that the reason they would not pay it was that you, burned the house yourself?" "What was the insurance on the house?" To the last question the accused answered \$200, and to each of the others he gave a negative answer. The court frequently cautioned him that he need not make answer to any question that would tend to incriminate him.

It is argued in support of the conduct of the trial at this point, that on cross-examination, the previous life and character of the witness, especially when he is a party, may be inquired into to such an extent as in the sound judgment of the trial court may seem proper. Such is undoubtedly the settled rule and it is resorted to generally where the person accused of crime offers himself as a witness in his own behalf. There is no rule by which the exercise of that discretionary power of the court can be guarded with exactness. The range is necessarily broad in order to fit the facts of particular cases, but there is a limit beyond which it cannot go. That limit is clearly reached and passed when questions are asked, manifestly, for the mere purpose of creating prejudice in the minds of the jurors, or the examination is carried on to such an extent and in such a manner as to become oppressive, and is not warranted by anything in the case. Questions as to previous convictions of criminal offenses, or serving terms in prison or in jail from which convictions will be presumed, are uniformly permitted when the instances are not too remote, upon the theory that a person of that character will not be as likely to testify truthfully as a man whose life has not been thus blackened. Our statute (section 4073, Rev. St.) expressly allows that kind of cross-examination. Questions relating to mere criminal charges, or acts which might be the foundation for criminal prosecutions, are usually rejected. They should not be permitted unless there are circumstances in the case suggesting that justice will or may be promoted thereby. It would be a clear abuse of judicial discretion to permit such questions where the indications are plain that the purpose is not to bring out the truth in regard to the witness' life and character, and to thereby discredit his testimony, but for the purpose of discrediting the witness, regardless of whether there is any warrant

for the questions or not, and if he be a party, in that way to influence the minds of the jurors into a verdict against him.

The administration of justice requires that trial courts shall not have their discretionary powers circumscribed by any very narrow boundaries, but does not require that such limit shall be placed upon them as will prevent any mere prejudice to be built up in the course of a trial, especially in an important case like this, which will tend to influence a jury to determine the facts otherwise than from the legitimate evidence produced in court. It seems clear that such limit was passed in allowing the cross-examination in question, to the extent to which it was carried. It is one thing to honestly ask questions on cross-examination for the purpose of discrediting a witness, and quite another to ask questions of a witness who is a party, especially in a serious criminal case, for the purpose of injuring his cause in the eyes of the jury, and leading them to believe he was likely, because of his bad character, to have committed the offense charged. A reading of the questions under consideration leads to the irresistible conclusion that no idea was entertained by the cross-examiner that proof would be elicited of the matters implied by them. We say "implied" because the asking of the direct questions in the manner in which they were asked, implied to some degree that the examiner was possessed of information upon which the questions were based, and although the answers were in the negative, the bad effect of the insinuations thrown out by the questions was not and could not have been removed entirely from the minds of the jurors. It is useless to refer to authorities on this subject. Text writers and adjudged cases are generally in accord that, so long as the cross-examination is carried on with reasonable fairness, to test the credibility of the witness, it is permissible, but the moment questions are asked concerning facts touching the witness' character, which are irrelevant to the facts in issue for any other purpose than to affect his credibility or which manifestly do not bear on the subject of credibility, the right of cross-examination is abused, and on objection should be restrained within the legitimate limits. Whart. Ev. § 473, § 477, and notes.

The general rule that the previous life and character of a witness can be inquired into, must be preserved, and the broad discretionary power of trial courts in administering such rule

fully recognized. The trouble here is that the cross-examination was allowed to be carried on manifestly without any reason except to create prejudice against the accused in the minds of the jurors. It was well calculated to have that effect and to bear materially on the ultimate result, especially since the whole case rested on circumstantial evidence. It is clearly reversible error that cannot be overlooked without lowering the standard of justice which it is the duty of the court to rigorously maintain.

The accused endeavored to account in part for the change in his financial condition, which the evidence tended to show manifested itself soon after the disappearance of Nelson, by proving that he made a horse-doctoring trip with Nelson in the spring of 1896 and realized therefrom about \$200. To throw discredit on the testimony of the accused in that regard, the prosecution offered in evidence a memorandum book containing some writing on a few pages, which was testified to as being in the handwriting of Nelson. That evidence was received against objection, the court remarking in substance, that it tended to contradict the testimony of the accused. On one page, under date of April 30, 1896, are several entries of debit and credit items, relating to traveling expense, but with nothing to show any connection of *Buel* therewith, or any one other than the person who made the memoranda. On one page, under date of October 24th, the year not being stated, and the words "E. M. Buel, cash received" being written at the top of the page, are several entries aggregating \$25.75. On one page, under date of May, 1896, there is one entry of a debit and a credit item, no name appearing or indication of what the entries refer to. On one page, under date of April 30, 1896, are several entries referring, apparently, to the cost of a span of horses, set of harness, wagon and some small articles. On another page, under date of April 30, 1896, entitled "Medicine Bill," are several entries of debit and credit, with a balance brought down. All entries but two, other than those made in October of an unknown year, were made at one time, and there is nothing to indicate that *Buel* had any connection with them or with the book, and there is no evidence that he ever saw or knew of it, or to show, except by mere surmise, that the entries had any relation to any business transaction between *Nelson* and *Buel*, except those which refer to a date long before the horse-doctoring trip.

Upon what principle the book was admitted in evidence as tending to impeach the evidence of *Buel*, is not discoverable. It had no such effect, legitimately. It received that effect merely by the suggestion of the court that it tended that way. The book was, at most only a private memorandum book of Nelson's containing unintelligible entries so far as relate to any circumstance bearing on this case. The receipt of it by the court as impeaching evidence on one of the material though possibly not necessarily evidentiary circumstances in the case, that is, the financial circumstances of the accused after the disappearance of Nelson, was highly prejudicial.

The court refused to allow proof of declarations of third persons containing threats against Nelson. If that evidence was offered for the purpose of showing motive for Nelson's leaving the county, it was immaterial, in the absence of anything to show that the threats were communicated to Nelson. Again, the motive that moved Nelson to go away was fully established to be fear of the Wettenhall prosecution, and there was no dispute on that question. If the evidence was offered for the purpose of creating an inference that some one other than *Buel* was guilty of the homicide, the evidence was clearly inadmissible. Whart. Ev. § 235, and note; Jones, Ev. 300; *State v. Haynes*, 71 N. C. 79; *State v. Weaver*, 57 Iowa, 730, 11 N. W. 675. It was properly rejected on any theory.

Evidence was rejected regarding statements made by Buel to third persons before the commission of the offense, as to his intention to buy a farm. The evidence was directed to a time so near the homicide that it was properly rejected as self-serving declarations. It was also properly rejected upon the ground of being pure hearsay. *McKinnon v. Meston*, 104 Mich. 642, 62 N. W. 1014. Again, proof of a mere purpose to buy a farm some time after the homicide, would have had such a very remote bearing, if any on the evidentiary circumstance of the sudden change in the financial circumstances of the accused, that it was properly rejected on that ground. It may be freely admitted that proof of declarations to establish the fact of intent is admissible in a proper case. *Insurance Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909; *Insurance Co. v. Mosely*, 8 Wall. 397. But the offer in question does not come within the rule in that regard or of any of the exceptions to the general rule against hearsay evidence.

The court was specially requested to instruct the jury that before finding the defendant guilty of any crime, they should require equally as strong and conclusive evidence of his guilt as would be required by them as careful and prudent men to enter upon the greatest and most important acts of their lives. The request embodied, substantially, a correct rule of law, which the accused was entitled to have given to the jury, and unless the general charge sufficiently covered it, the refusal to grant the request was reversible error.

There are cases in the books of reversals because of erroneous instructions given on the line under consideration. *Anderson v. State*, 41 Wis. 430; *Emery v. State*, 92 Wis. 146, 65 N. W. 848. But so far as we know, the failure to instruct at all in that regard, where the jury were fully instructed otherwise on the subject of reasonable doubt, has never been held reversible error or seriously criticised.

The use of such expressions as, "the jury before convicting an accused person should be convinced of his guilt with that degree of certainty requisite to lead men to act in the most important affairs of life," or "in considering the evidence and coming to a conclusion, the jury should exercise all the care, caution and judgment that men exercise in the most important affairs of life," or the jury "should be convinced only by the same proof as that which would convince men and upon which they would act in the management of the gravest and most important matters, and in arranging the most serious affairs and concerns of life," or the jury "should not convict unless from the whole evidence in the case they have an abiding conviction to a moral certainty that the accused is guilty," are each and all mere explanatory expressions to convey to the minds of jurors the exact meaning of the term "beyond a reasonable doubt" and the degree of certainty which such term calls for. They are generally given as the equivalent of the general expression that, "in order to convict, the jury should be convinced of the guilt of the accused beyond a reasonable doubt." The latter expression contains all there is of the rule, and it was given to the jury in this case with commendable fullness. This may be said without expressing an approval of the charge on the subject as a model for clearness. The general instructions on such subject, found in the different portions of the charge, are as follows: "A jury is never authorized to convict a man

of crime until the presumption of innocence is overcome by credible evidence." "You will not convict the defendant unless you are satisfied from the whole evidence that the defendant, *Eugene Buel*, wilfully, feloniously and with malice aforethought, or with premeditated design to effect the death of Peter F. Nelson, killed and murdered him at the time and place alleged in the information. *If each and all of you are satisfied that each and every material thing set out in the information is true and has been proved by the evidence beyond every reasonable doubt, you will convict, if you are not so satisfied you will acquit.*" "The defendant's guilt must be established by the evidence to the exclusion of every other reasonable hypothesis." "If a reasonable doubt exists in your minds of defendant's guilt, of any material allegation set out in the information, your verdict will be not guilty. A reasonable doubt, or doubt to be of avail to this defendant, is a doubt founded upon reason." "The State is not bound to prove, in a criminal case, a defendant's guilt beyond all possibilities, beyond all conjectures; for possibilities, conjectures, doubts, will arise in most any, if not all, criminal cases." In view of such full instructions, the question is, was it error for the court to refuse to give the explanatory instruction requested?

To say that a failure to explain the meaning of the phrase "beyond a reasonable doubt" is reversible error, is a doctrine that has but very little support in the books. Much discussion is found in the adjudged cases as to whether any attempt to explain it does not tend to confuse rather than to enlighten the jury. It is said that scholastic attempts to explain the meaning of such words, which are more easily understood than explained, are liable to lead such men as commonly make up our juries to think that the ordinary processes of reasoning, by which they are accustomed to come to conclusions in the ordinary affairs of life, are not suitable to the jury room in a criminal case, but that some other process of reasoning is to be adopted which they are to gather from the language of the trial judge, and that they are thereby really weakened in their ability to come to a just conclusion; that it would be better to leave them to exercise their own intelligence in regard to language so plain that it is not easy to make it plainer by explanation. Mr. Justice Newman said, in *Hoffman v.*

State, 97 Wis. 576, 73 N. W. 52: "It needs be a skillful definer who will make the meaning of the term ('beyond a reasonable doubt') more clear by the multiplication of words," while the writer expressed the view in *Emery v. State*, 101 Wis. 627, 78 N. W. 145, that the due administration of justice in many cases requires a careful explanation of the term to be given to the jury, and that without it justice is liable at times, through ignorance, to be defeated, and the efficacy of the law to protect society, and its administration by courts, discredited. In *State v. Sauer*, 38 Minn. 438, 38 N. W. 355, Mitchell, J., expressed the opinion that "most attempts at explaining the meaning of a 'reasonable doubt' are made by the use of expressions that themselves need explanation more than the term sought to be explained by them, and that the better way is to omit such attempts, but that if such attempts be indulged in it would be better to adopt those definitions that have received general approval by courts." In *People v. Stubenvoll*, 62 Mich. 329, 28 N. W. 883, Champlin, J., speaking for all the members of the court, said: "We do not think that the phrase 'reasonable doubt' is of such unknown or uncommon signification that an exposition by the trial judge is called for. Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further defining or refining. All persons who possess the qualifications for jurors know that a doubt of the guilt of the accused, honestly entertained, is a reasonable doubt." In Judge Thompson's work on Trials (volume 2, § 2469), it is said that "all the definitions are little more than metaphysical paraphrases of an expression invented by the common-law judges for the very reason that it was capable of being understood and applied by men in the jury box." Many more instances might be given where judges of appellate courts and text writers have discouraged all attempts at explanation of what is a reasonable doubt, from the standpoint of a juror. Nevertheless the fact remains that trial judges, at least in important criminal trials, generally take great pains to explain the term so that the commonest understanding can grasp its meaning. The practice in that regard has grown up from frequent observations of the necessity of it. It is considered here that it is proper in all cases to make a careful explanation of the term, and that where the prosecution relies wholly

on circumstantial evidence it is the better practice to do so, taking the utmost care, however, to use only expressions that have been approved, particularly by this court. No better illustration that the term is not easily understood, as suggested in some of the cases referred to, or of the care that should be exercised in explaining it, need be given than the failure of Mr. Justice Champlin to correctly explain the term after declaring that no explanation was needed. He stated that all persons qualified for jurors know that an honest doubt is a reasonable doubt. In the first place it is by no means certain that all jurors will be intellectually qualified for their duties without instruction; and again, clearly, every honest doubt is by no means a reasonable doubt. A doubt, however honest, may be, and often is, very unreasonable. From the standpoint of a juror, in considering a case on the evidence, a doubt however honest is not reasonable unless based on reason and common sense as applied to such evidence. It is considered that, in this case, the better practice would have been to have given to the jury the explanatory instruction as requested, but inasmuch as the subject was covered by clear language in the general charge, the refusal was not reversible error. *State v. Martin*, 30 Wis. 216; *Allen v. U. S.*, 164 U. S. 492, 17 Sup. Ct. 154; *Harris v. U. S.*, 8 App. D. C. 20; *Stevens v. Com.* (Ky.) 45 S. W. 76; *Taylor v. State* (Tex. Cr. App.) 42 S. W. 285; *Johnson v. State* (Tex. Cr. App.) 45 S. W. 901; *State v. Hamilton*, 57 Iowa, 596, 11 N. W. 5; *State v. Ruthven*, 58 Iowa, 121, 12 N. W. 235; *Comstock v. State*, 14 Neb. 205, 15 N. W. 355; *State v. Hayden*, 45 Iowa, 11; *State v. Glass*, 5 Or. 73.

The following instructions were requested and refused:

"(1) If you have a reasonable doubt as to these being the remains of Peter F. Nelson, or if you have a reasonable doubt as to whether the deceased came to his death at the hand of the defendant, then, and in each case, it is your duty to acquit.

"(2) The fact that the crime has been committed and the fact that this defendant committed that crime, must be proved independently of each other and beyond a reasonable doubt; and circumstances not tending to prove the commission of the crime, but tending to prove the guilt of the defendant, provided the crime has been committed, cannot be considered

by the jury in considering whether or not the deceased came to his death through criminal means.

"(3) If the jurors believe that the evidence upon any essential point in the case admits of the slightest doubt consistent with reason, the defendant is entitled to the benefit of the doubt and should be acquitted."

Also, in substance: The law presumes the accused to be innocent until his guilt is established by the evidence beyond a reasonable doubt, to the satisfaction of each and every one of the jurors. The presumption of innocence should be acted upon by you throughout the whole trial unless so overcome by evidence as to show the guilt of the defendant beyond a reasonable doubt. You cannot legally convict upon the preponderance of evidence or upon suspicion, however strong, or by any matter outside of the evidence produced in court.

It is sufficient to say as to each of the requests mentioned that it was covered by the general charge. In order to have carried home to the minds of the jurors with greater distinctness the full sense of the general expressions used regarding the term "reasonable doubt," and the "presumption of innocence," considering the gravity of the case and the nature of the evidence upon which it rested, it would have been a better administration of justice to have given some, at least, of the instructions requested, particularly 1 and 2. It is always best in the trial of so serious a case as this, where all there is of value in life is at stake on the one hand, and the most important interests of the people as a whole are at stake on the other, when an instruction is requested covering a vital question in the case, which in the judgment of the attorneys representing the accused person will more fully convey to the minds of the jurors a correct rule of law in regard to such question, and which is clearly more specific, than that of the general charge, to either embody it in such charge or to give it separately; but a failure to do so, when such charge is full upon such question, in language reasonably clear to men of ordinary comprehension, cannot be considered reversible error. Here the jury were told that the accused was not called upon to prove his innocence, but that the State was required to prove his guilt beyond a reasonable doubt, and that each and all of the jurors, before rendering a verdict of guilty were required to come to a conclusion from the evidence produced

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in court in accordance therewith beyond a reasonable doubt, and as to each and every material thing set out in the information, and that guilt was established by such evidence to the exclusion of every other reasonable hypothesis, and that they were required to be unanimous in their final conclusion in that regard when rendering a verdict of guilty, and not to so conclude until the presumption of innocence in favor of the accused was overcome to their satisfaction by credible evidence, with the degree and certainty mentioned. Such instructions must have conveyed, reasonably, to the minds of the jurors all that was sought by the requests rejected. It would have been well to have told the jury that the charge contained in the information included, first, the death of a human being, second, that the death was produced by criminal means, third, that the person supposed to have been murdered was Peter F. Nelson, fourth, that the accused was the guilty party, and that each fact was required to be established independent of any other fact, and that each and all of them, and every evidentiary fact necessary to the existence of either of them, should be established beyond a reasonable doubt and so as to exclude to a moral certainty, or beyond a reasonable doubt, every reasonable hypothesis inconsistent therewith (*Kollock v. State*, 88 Wis. 663, 60 N. W. 817) in order to justify a conviction; and that it was the duty of the jurors to base their conclusion as to each of such facts on the evidence and the evidence alone produced on the trial tending to establish it. It is by no means clear but that instructions along that line would have been more clearly understood by the jury than the general statement that it was essential to a conviction that the State should establish by the evidence each and every material thing set out in the information beyond a reasonable doubt and so as to exclude every reasonable hypothesis inconsistent with guilt. But it is not possible for the jury to have acted in this case upon any other theory than that they were required to find, in order to convict, that the remains found were those of a human being, that he came to his death by a criminal means, that such human being was Peter F. Nelson, and that plaintiff in error was the guilty party, and that those facts were all "matters contained in the information."

The court instructed the jury as follows: "The State has offered in evidence certain alleged facts and circumstances

tending to contradict or explain the evidence of defendant, as follows: That the defendant has not proven that the shoes and pantaloons said to have been found with the remains were not the property of said Nelson; that the defendant's testimony as to several material matters," mentioning them, "has not been corroborated." We must admit that we are unable to discover what was in the judicial mind in giving such instructions, and no help in that field has been furnished by the learned Attorney General. We have read the language of the trial judge, and re-read it, and the more study put upon it the more obscure the meaning of the language has become. "The State has offered in evidence certain alleged facts and circumstances tending to explain or contradict the evidence of the defendant; that the defendant has not proven that the shoes and pantaloons said to have been found with the said remains were not the property of the said Nelson." We will not attempt to explain or discover what idea such language was intended to convey, or that of the other language to which we have referred in the same connection. The expressions seem to be misleading and inaccurate throughout. The only way they could be passed over as not prejudicial, would be to hold that the meaning, whatever was intended, is so obscured that neither it nor any other is likely to have been conveyed to the minds of the jurors, and to support that view there is much reason. But it is more likely that the jury may have been misled. In that view the instructions were erroneous and of some positive evidence of identification of the shoes and pantaloons, was cast upon the defendant and that he was required to prove that they were not the property of Nelson; and that the testimony of the accused on the various other matters mentioned was not to be taken as true unless corroborated. In that view the instructions were erroneous and prejudicial in a high degree. Obviously, the burden of proof at no point in the case was shifted from the State to the accused. It rested on the prosecution from the beginning to the end of the trial, and if, taking the evidence of the accused, whether corroborated or not, with all the other evidence produced, whether bearing on a fact in issue or an evidentiary fact sought to be established, a reasonable doubt was left in the minds of the jurors as to its existence, it was the duty of the jury to resolve that doubt in favor of the accused.

Further instructions were excepted to on the ground that they contained misstatements of the evidence and assumed the existence of facts which were in dispute, none of which exceptions seem to be sustained by the record. It is said that the court improperly told the jury that no one but Pugh, the banker, and *Buel*, knew that Nelson had the money in his possession, because a policeman went to the bank with Pugh when he took the money from the vault. The record shows that Nelson remained in Pugh's house while the latter went to the bank accompanied by *Buel*, and a policeman whose services were secured for that purpose, but that after the money was taken from the bank Pugh and *Buel* returned to Pugh's house; that the policeman did not accompany them back and that when the money was paid over to Nelson only he, Pugh and *Buel* were present. It is further said that the court instructed the jury that Nelson did not leave the county immediately after receiving the money. The record shows, however, that what the court said was that evidence had been produced tending to show that instead of Nelson leaving the county immediately after obtaining the money, according to his expressed intention to the banker who paid it to him, he went into the county. That was true according to the undisputed evidence.

There are some other matters of which complaint is made, but none that appears to be of importance except this: At the close of the evidence the court directed the attention of the jury to a particular part of the evidence, and said: "*It is perhaps hearsay, and that and all other evidence of a hearsay character, whether objected to or not, is now stricken from the record and the jury are directed to disregard it.*" That is called to our attention as a cause for reversal, but it does not appear that any exception was saved in regard to it. That it was error of a most serious character seems plain, though it is not a cause for reversal because a proper exception was not taken. Since the case must go back for a new trial it is deemed proper to refer to the matter so that such an error may not occur again. If there had been a jury of lawyers in the box they could not have complied with the judge's direction with unanimity. What is hearsay and what is not hearsay is not always easily determinable. Again, not all hearsay is inadmissible as evidence. Such a sweeping direction given to the

jury, leaving them to determine what evidence to reject, is without precedent probably in the history of judicial trials reported in the books. If any such a proceeding were sustainable, the trial court could admit any kind of evidence and then clear the record at the close of the trial by a general order striking out all the evidence that was subject to objection by either party for any cause and a general direction to the jury to consider what was left. That practice would obviously save trial judges much mental labor and anxiety, but the administration of justice would be sadly defective.

It is considered that we have now referred to each of the numerous matters brought to our attention by the plaintiff in error that is material or that will be liable to arise on another trial. The conclusion is reached that because of the errors committed, to which we have referred, injustice has been done the plaintiff in error, and that the judgment must be reversed. A person circumstanced as the plaintiff in error was is entitled to a fair trial according to the law of the land and the settled practice of the courts. That is the right of every person accused of crime and it should be awarded with the utmost strictness in a case of this importance. That right is just as sacred and to be just as fully guarded in one case as in another, no regard being had to the importance or significance of the accused as a member of society.

By the court:

The judgment of the Circuit Court for Sawyer County is reversed and the cause is remanded to such court for a new trial, for which purpose the warden of the State prison is directed to deliver the plaintiff in error, *Eugene Buel*, to the sheriff of such county, who is directed to safely keep the said *Buel* in his custody until discharged therefrom or as otherwise ordered according to law.

STATE V. BOSWORTH.

74 Vt. 315—52 Atl. Rep. 423.

Decided May 12, 1902.

CRIMINAL COMPLAINT: *Complaint of a violation of a city ordinance should aver that the ordinance was adopted and in force—Demurrer not waived—The fine goes to the State—Minor points.*

1. In a criminal complaint based on an alleged violation of a city ordinance, an indirect averment that the act complained of was done in violation of the ordinance is insufficient. There should be direct averments that the ordinance was adopted, and was in force at the time of the act complained of.
2. A prosecution for a violation of a city ordinance, being a criminal case, a demurrer to the complaint is not waived by pleading over.
3. In Vermont, a fine imposed for a violation of a city ordinance goes to the State.
4. The case being for the construction and maintenance of a drain and soil pipe, the question as to whether the ordinance was reasonable in its provisions relating to changes in existing drains, is not passed upon.
5. A harmless instruction.

Supreme Court of Vermont.

Exceptions from Washington County Court; Watson, Judge.

S. H. O. Bosworth, convicted of violating an ordinance of the city of Montpelier, brings exceptions. Reversed.

Argued before TAFT, C. J., and ROWELL, TYLER, MUNSON, START, and STAFFORD, JJ.

Richard A. Hoar, State's Attorney, for the State.

T. J. Deavitt and *Edward H. Deavitt*, for respondent.

STAFFORD, J. The city of Montpelier is authorized by its charter to make ordinances directing the location and management of all private drains, and compelling their construction under such regulations and inspection as the Council may adopt. Acts 1894, No. 166, §§ 21-29; Acts 1896, No. 149, § 2. It has made an ordinance that "all drain and soil pipes when within a building, and for a distance of not less than five feet outside the foundation walls thereof, shall be of iron, with leaded or screwed joints, not less than four inches in diameter, supplied with a running trap, of the same size and diameter as the pipe, placed near the foundation wall, with an accessible clean-out," and that "a person neglecting or refusing to comply with the requirements, or violating any of the provisions, shall be fined not more than twenty-five dollars, nor less than one dollar, for each offense."

The complaint is that the respondent "did erect, build, and maintain a drain and soil pipe within his building," which is described, "and for a distance of five feet or more outside

the foundation walls of said building, of tile, and without leaded or screwed joints, and without being supplied with a running trap placed near the foundation wall or elsewhere, and without an accessible clean-out, and caused the same to be connected with the public sewer;" all of which is alleged to be "contrary to sections" so and so "of the general ordinances of said city"—being the same we have just quoted. It then recites the sections word for word, and concludes regularly against the form of the statute.

The respondent demurred, and now insists that the complaint is bad, in that it does not say whether the respondent built a new drain or only maintained an old one; but it plainly charges him with constructing one contrary to the ordinance, and such was the evidence on trial.

He also insists that it is bad in that it fails to allege that the ordinance was adopted by the city. This is matter of fact to be alleged and proved; for the court cannot take judicial notice of the ordinance, though it can of the charter, as that is a public act. *Winooski v. Gokey*, 49 Vt. 282; *State v. Cruickshank*, 71 Vt. 94, 42 Atl. 983, 11 Amer. Crim. Rep. 385; *State v. Soragan*, 40 Vt. 450.

The demurrer was overruled, *pro forma*, in the County Court, and the defendant ordered to plead over, which he did; but, this being a criminal case, he has not thereby waived his right to insist upon his demurrer, and he does so here by pointing out that there is no direct averment that the by-law was ever adopted, nor that it was in force when the acts that are complained of were committed. There is an indirect averment of the adoption, for the acts are alleged to have been done contrary to an ordinance of the city, which implies that the ordinance had been adopted. But this is not enough. The complaint is bad for want of a direct averment that the ordinance was in fact adopted, and in force at the time in question.

It was claimed below, and is here, that the ordinance is unreasonable if, and in so far as, it may require changes in existing drains. We do not stop to consider this, for the complaint and proof here are that the respondent constructed a drain such as the ordinance forbade.

It is said that the court erred in telling the jury that, so far as the case showed, the soil pipe was never outside the walls.

It made no difference whether it was all within or not, if the part within and for five feet without—i. e., as far as the ordinance undertook to regulate it—was constructed, as this was, in violation of the ordinance. So that the respondent was not harmed.

It is said the fine should be to the city, not to the State.

The City Court had exclusive original jurisdiction, but, the case being criminal in its nature, there was the same right of appeal as from a justice of the peace. Acts 1894, No. 166, § 36. Fines imposed by the City Court are payable to the judge, who is to account for the same to the proper treasurer, as provided by law in the case justices of the peace. *Id.* § 37. In all cases appealed and entered in County Court, the fine and costs shall be payable to the State, and the State shall pay the justice bill of costs. V. S. § 2016. The fine goes to the State.

The respondent's exceptions are sustained, the verdict, judgment and sentence set aside, and the cause remanded.

MILLER v. STATE.

81 Miss. 162—32 So. Rep. 951.

Decided November 17, 1902.

CRIMINAL COMPLAINT: *Amended complaint failing to charge the offense, as "against the peace and dignity of the State."*

1. An amended criminal complaint must be sufficient in itself, and, if it fails to charge the offense, as "against the peace and dignity of the State," the prosecution is a nullity.

Supreme Court of Mississippi.

Appeal from Circuit Court of First District, Coahoma County; Hon. Sam C. Cook, Judge.

M. Miller, convicted of crime, appeals. Reversed.

D. A. Scott, for appellant.

William Williams, Assistant Attorney General, for appellee.

CALHOON, J., delivered the opinion of the court.

The original affidavit is an attempt, in one paragraph, to charge both an unlawful sale of intoxicants and a solicitation of orders for sale, but, as matter of law, it charges neither. The District Attorney, seeing the defects, got leave and filed an "amended affidavit," which confines the charge to the solicitation, but inadvertently omits to conclude with the words required by the Constitution, "against the peace and dignity of the State," which are indispensable. Constitution, sec. 169; *State v. Morgan*, 79 Miss. 659, 31 So. Rep. 338; *Love v. State*, 8 So. 465.

Because of this omission, the prosecution is a nullity, as the cases cited hold. The amendment purports to be an "amended affidavit," and must stand or fall by itself. It does not merely amend on leave had to add to, or take from, or interpolate words in the original. It is quite plainly an independent document—a substitute for the old one.

Another amendment may show an unlawful solicitation, and, in a separate count, an unlawful sale, if that also be relied on, so as to convict on either, or both, if the proof warrants. *West v. State*, 70 Miss. 599, 12 So. 903.

Reversed and remanded.

STATE V. RODGERS.

29 So. Rep. 73.

Decided January 7, 1901.

CRIMINAL COMPLAINT—ASSAULT: *Offer to amend, on appeal; yet insufficient.*

Held—That a criminal complaint which charged that on a certain day, the accused "did make an assault on affiant by cursing and threatening him with bodily harm, and pursuing said affiant," was insufficient, and would still have been so if amended in the Circuit Court on appeal, by inserting the words, "in said District No. 2," and adding at the conclusion the words, "against the peace and dignity of the State of Mississippi."

Supreme Court of Mississippi.

Appeal from Circuit Court, Tunica County; Hon. F. E. Larkin, Judge.

Steve Rodgers, convicted before a justice of the peace, appealed to the Circuit Court, where he moved to quash the complaint, and the District Attorney moved to amend it. The motion to quash being sustained, the State appealed. Affirmed.

Monroe McClurg, Attorney General, for the State.
J. P. Lowe, for the appellee.

TERRAL, J. The appellee was charged before a justice of the peace, Cooney, by affidavit, as follows: "State of Mississippi, Tunica County. Before me, J. W. Cooney, a justice of the peace of said County, District No. 2, John Flemin makes oath that on or about April 30th Steve Rodgers did make an assault on affiant by cursing and threatening him with bodily harm, and pursuing said affiant. Sworn to and subscribed before me this, the 4th day of May, 1900. J. W. Cooney, J. P." Being convicted before Cooney, he appealed to the Circuit Court, and there moved to quash the affidavit, and for his discharge. The District Attorney moved to amend the affidavit by inserting after the word "did" the words, "in said District No. 2," and by adding at the conclusion of the affidavit the words, "against the peace and dignity of the State of Mississippi." Both motions were heard together, and the court quashed the charge and discharged the defendant. The charge, as made and as proposed to be amended, imported no charge of crime, as required by law, and the proceedings were properly quashed. See Whart. Prec. Ind. art. "Assault." Affirmed.

RUMPH V. STATE.

119 Ga. 121—45 S. E. Rep. 1002.

Decided December 8, 1903.

DISCHARGE OF FIRE-ARMS NEAR PUBLIC HIGHWAY: *Burden of proof as to whether act was in self-defense—Consent of owner of premises no defense to a third person—Consent may be a defense where the act is against an individual; but not when it is against the public—Conviction reversed because of lack of evidence.*

1. It is no defense to an indictment under the Penal Code, sec. 508, declaring that it shall be unlawful for any person to discharge

fire-arms on or near a public highway, "except in defense of person or property, or on his own premises," that the fire-arms were discharged on the premises of another by his permission.

2. In a prosecution based upon such section it is necessary to allege and prove that the shooting was not done "in defense of person or property."

(Syllabus by the Court.)

Supreme Court of Georgia.

Error to City Court of Dawson; Hon. A. M. Raines, Judge.
Lewis Rumph, convicted of unlawfully discharging a fire-arm, brings error. Reversed.

W. H. Gurr and H. A. Wilkinson, for the plaintiff in error.
M. J. Yeomans, Solicitor, for the State.

COBB, J. The plaintiff in error was convicted of a violation of the law contained in Penal Code, § 508, which is as follows: "If any person shall, between dark and daylight, wilfully and wantonly fire off or discharge any loaded gun or pistol on a public highway, and within fifty yards of a public highway, except in defense of person or property, or on his own premises, he shall be guilty of a misdemeanor." The evidence showed that the accused shot a pistol about 9 o'clock at night in the yard of one McCraw, about ten yards from a public road. The accused contended in his statement that he shot the pistol by express permission of McCraw. Complaint is made that the court charged the jury that the consent of McCraw would not authorize the acquittal of the accused.

1. We think there was no error in this charge. The rule that "one may do for another whatever the other may do for himself"—see 1 Bish. New Cr. L. § 877 (3)—is subject to exceptions. It is undoubtedly true that in many cases where the party injured consents to the commission of the act no crime is committed. But no man has a right to consent for another to commit an offense against the public. The great majority of the penal laws are made for the protection of all the members of society, and not any particular individual or class of individuals. The permission of no person or number of persons will excuse the violation of this class of laws. 1 Clark & Mar. Crimes, § 150; 1 Whart. Crim. L. (10th ed.) § 142. The law now involved was manifestly framed for the

protection of the public. It is aimed at the wilful and wanton discharge of fire-arms on a public highway, or within fifty yards of such a highway, and not on the premises of the person discharging the fire-arms. It was perfectly competent for the General Assembly to protect the public against the wilful and wanton discharge of fire-arms by a person on his own premises. But from motives which were satisfactory to their minds they have made this an exception. They have not excepted his guest, shooting by his permission, and the courts have no authority to make such an exception. See, in this connection, *Brown v. State*, 114 Ga. 60, 39 S. E. 873. It is perhaps true that the same reasons which influenced the legislative mind to except the owner would also be just ground for excepting his guest; but this will not authorize a construction of the statute which would make an exception not warranted by its terms. If it were clear that the case did not fall within the spirit of the section, and constituted a right which was important to the protection of the person accused, the courts might be justified in holding that it was not within the legislative mind, and not within the terms of the section, though perhaps within the letter of the language used. See Bishop's Statutory Crimes, §§ 231, 235. But we have no such case as this. It would not have been unwise to prohibit wanton and wilful shooting by all persons and in all places, and the fact that one exception was made is no evidence that another was intended, though it might be justified by the same line of reasoning. Nor can it be said that this view would prevent a guest from defending the person or property of his host by the discharge of fire-arms, if necessary (see. 1 Bish. New Crim. L. § 877), because the use of the fire-arms under such circumstances would not amount to a wilful and wanton shooting.

2. It is also contended that it was incumbent upon the State to prove that the shooting was not done in defense of person or property. The accusation charges that the shooting was not so done, but the evidence is silent on the subject. This contention, we think, is well founded. It is to be observed that it is not a violation of the statute to shoot in defense of one's person or property, no matter where the shooting takes place. The fact that it was not so done is therefore an important element in the offense itself. In other

words, it is not an offense generally to shoot on or near a public highway, but such a shooting becomes an offense only when it is not done in defense of person or property, or on one's own premises. It was incumbent upon the State to negative each of these things in order to make out the offense. All are negatived in the accusation, and the fact that the shooting was not done on the premises of the accused was proved, but the State wholly failed to exclude the other two. The line is sometimes very closely marked between what exceptions need be proved and what need not. It is safe to say, however, that whenever the exception constitutes a part of the offense itself, and not merely an exception to a general offense previously defined, it is necessary to allege and prove that the case is not within the exception. Or, to state it differently, whenever a statute makes penal an act when committed by a particular class of person, or when committed under particular circumstances, it must appear that the person accused was within the particular class or committed the act under the particular circumstances. *Herring v. State*, 114 Ga. 96, 39 S. E. 866. But when the statute provides that the commission of an act by any person, or under all circumstances shall constitute an offense, and then declares that the provisions of the act shall not apply to a particular class of persons, or to a specified set of circumstances, the burden is on the accused to show that he comes within some of the exceptions. *Kitchens v. State*, 116 Ga. 847, 43 S. E. 256; *Tigner v. State*, 116 Ga. 114, 45 S. E. 1001. The same idea has been thus expressed: "Where a statute contains *provisos* and exceptions in distinct clauses, it is not necessary to state in the indictment that the defendant does not come within the exceptions, or to negative the *provisos* which it contains; but, on the contrary, if the exceptions themselves are stated in the enacting clause, it will be necessary to negative them, in order that the description of the crime, may, in all respects, correspond with the statute." *Elkins v. State*, 13 Ga. 435. See, also, in this connection, *Cook v. State*, 26 Ga. 605. In *Conyers v. State*, 50 Ga. 103, 15 Am. Rep. 686, it was held that, where the keeper of a billiard-table was charged with a violation of the statute prohibiting such keepers from permitting "any minor to play or roll on the same, without the consent of the parent or guardian," the absence of such consent was a

material element of the offense, and should be averred and proved. In the opinion Judge McCay took occasion to criticize the reasoning of the court in a previous decision wherein it was held that, when one was indicted under a statute prohibiting the sale of liquor without a license, it was not necessary for the State to show that the accused had no license, though he admits that the decision itself could be sustained on the theory that the fact of the existence or non-existence of the license was peculiarly within the knowledge of the accused. See, also, in this connection, *Newman v. State*, 63 Ga. 533.

In *Isom v. State*, 83 Ga. 379, 9 S. E. 1051, Mr. Chief Justice Bleckley says, *arguendo*, that an indictment for stabbing should allege, and the State should prove, that the stabbing was not done by the accused "in his own defense or other circumstances of justification," the statute providing that any person guilty of stabbing, except under the circumstances quoted, shall be punished.

We conclude that the court committed error in overruling the motion for a new trial on the ground that the conviction was not warranted by the evidence.

Judgment reversed. All the Justices concur.

NOTE (By J. F. G.)—In cases of larceny, burglary and other crimes against the property of individuals, *non-consent* is an element of the crime. So where the owner of property consents to its being taken, the taking is not larceny; nor is the breaking into a person's dwelling-house burglary, if the entry is with the owner's consent. In these cases, the rule applies, even though the consent is implied, or given through a detective for the purpose of entrapping the supposed criminal. On this phase of the subject, consult the Table of Topics, under the sub-division ENTRAPMENT.

PURDEE v. STATE.

118 Ga. 798—45 S. E. Rep. 606.

Decided October 30, 1903.

EVIDENCE: *Admissible to contradict and discredit a witness—Hostility of a witness, proper subject testimony.*

1. The state of a witness' feelings to the parties may always be proved for the consideration of the jury.

2. The evidence rejected was of a character which would throw light upon the state of the witness' feelings to the accused, and in a case like the present its rejection is cause for a new trial. (Syllabus by the Court.)

Supreme Court of Georgia.

Error to the Superior Court, Montgomery County; Hon. D. M. Roberts, Judge. Trial in Superior Court, June 11, 1903. John Purdee, convicted of burglary, appeals. Reversed.

J. B. Geigher, for the plaintiff in error.

John F. DeLacy, Solicitor General, for the State.

COBB, J. Purdee was convicted of burglariously entering the dwelling-house of one Snow, and he assigns error upon the refusal of the judge to grant him a new trial.

In one ground of the motion for new trial complaint is made that the court refused to allow the accused to prove by the prosecutor that on the morning after the alleged burglary he went to the house of Purdee and committed an assault upon him. Error is also assigned upon the exclusion of two indictments against Snow, on charging him with an assault and battery upon Purdee on the day after the alleged burglary, and the other with using profane and vulgar language to Purdee on the same day. Upon each of the indictments appeared a plea of guilty. All of the evidence was offered for the purpose of impeaching Snow, who had testified that he was on friendly terms with the accused, and the indictments were offered for the additional purpose of showing the state of the witness' feeling toward the accused. The state of a witness' feelings to the parties may always be proved for the consideration of the jury. Pen. Code § 1023. If a witness for the State in a criminal case testifies, as prosecutor did in this case, that he is on friendly terms with the accused, it is competent for the accused to prove the contrary, for the purpose of discrediting the witness. See *Daniel v. State*, 103 Ga. 202, 29 S. E. 767, and the cases therein cited, where this question is discussed.

Under the rulings just referred to, we think the evidence offered was material for the purpose of enabling the jury to see what was the real state of feeling between the prosecutor and the accused. The conviction of the accused could not have been had without the testimony of Snow, and, as the case is, upon its

merits, at best a doubtful one, we think the accused was entitled to the benefit of the evidence offered for whatever it was worth. The court erred in rejecting the oral evidence and the two indictments referred to.

There was another indictment offered in evidence, showing that Snow had also been indicted for pointing a gun at one Wright, the brother-in-law of the accused. There was no error in rejecting this indictment, it not appearing that the accused had any connection with the transaction leading up to the indictment or that he was at all responsible for the prosecution.

Judgment reversed. All the Justices concur.

TIPTON v. STATE.

119 Ga. 304—46 S. E. Rep. 436.

Decided January 12, 1904.

EVIDENCE—PRACTICE: *Circumstantial proof as to time and venue—Province of jury—Statute of Limitations—Alibi—Indictment.*

1. An indictment must allege a certain time within the statute of limitations, but on the trial the date may be established by circumstantial evidence.
2. Ordinarily, when a month is referred to, it will be understood to be of the current year, unless from the connection it appears that another is intended.
3. The indictment charged that the offense was committed on August 25, 1903, and on the trial thereafter during the same year the prosecutor testified that the offense was committed on August 25th, without stating the year. The defendant sought to prove an *alibi*, and offered evidence as to where he was on August 25, 1903. It being evident that both the State and the accused understood that the proof went to establish the commission of the act on the day charged in the indictment, a new trial will not be granted on the ground that the evidence left uncertain the time when the offense was committed.
4. Proof that the prosecutor lived in Walker county, and that he was assaulted while in his residence, sufficiently established the venue.
5. It was for the jury to determine whether the positive identification of the defendant as the perpetrator of the crime was met by the proof offered to establish an *alibi*.

6. Where one was charged with an assault with intent to murder A, and it appeared that the defendant had fired into a house in which A, B, C, and D were living; that one shot came near B and another within 18 inches of A—there was evidence to support a conviction of an assault with intent to murder A.
 7. This court cannot grant a new trial on the ground that the punishment was excessive, even though the defendant was found guilty with a recommendation to mercy.
 8. The newly discovered evidence was merely cumulative of that previously offered in support of the defense of *alibi*. Besides, there was no showing as to the character and credibility of the new witnesses. Civ. Code 1895, sec. 5481.
 9. There being no error of law assigned other than that the verdict was contrary to law and the evidence, and the evidence being sufficient to support the verdict, this court will not interfere with the discretion of the judge in refusing a new trial.
- (Syllabus by the Court.)

Supreme Court of Georgia.

Error to Superior Court, Walker County; Hon. W. M. Henry, Judge.

Fayette Tipton, convicted of assault with intent to kill, brings error. Affirmed.

Lumpkin & Rosser and John W. Bale, for the plaintiff in error.

Moses Wright, Solicitor General, *contra*.

LAMAR, J. An indictment must allege a certain time within the statute of limitations when the offense was committed. *Bailey v. State*, 65 Ga. 410. If the day and month are given and the year is omitted, it is insufficient. Hence, a charge that an offense was committed on "the 3d of June instant" was held to be defective in *Com. v. Hutton*, 5 Gray, 89, 66 Am. Dec. 352; *People v. Gregory*, 30 Mich. 371. (In official Mich. Rept. this case is as cited here. But in official Ga. Rept. the case is cited *Gregory v. People*.) *White v. State*, 93 Ga. 48, 19 S. E. 49 (4). While the allegations in the indictment must be specific, the time may be established by circumstantial evidence, and the present case is within the rule laid down in *Tillson v. Bowley*, 8 Greenleaf (Me.) 163, followed in *Marston v. Jenness*, 12 N. H. 144, that "when a month is referred to, it will be understood to be of the current year, unless from the

connection it appears that another is intended." Contra, *Le-britter v. State*, 42 Ind. 383. The indictment was found on August 26, 1903, and alleged that the assault with intent to murder was committed on August 25, 1903. The trial took place in September, but during the same term at which the indictment was found. The witness for the State testified that the "shooting occurred at 9:15 p. m. on August 25." The defendant endeavored to establish an *alibi* and offered much evidence to show that on August 25, 1903, at 9:15 p. m., he was at a church, about four miles distant. The State offered other evidence in rebuttal. From this it appears that both sides understood that August 25, 1903, was the time referred to by the witnesses for the State; and, there being no request to charge on this subject, or as to the statute of limitations, and the only complaint being that the verdict is contrary to law and evidence, we do not feel authorized to grant a new trial upon the ground that the year was not established with sufficient certainty.

It is now well settled that the failure to establish the venue can be taken advantage of on the general ground that the verdict is contrary to law, even though no question on that subject was raised in the lower court, and no specific assignment of error to call the State's counsel's attention to the fact that a reversal will be asked on that ground. But these rulings will not be extended; the record will be searched; and if it appears, even by circumstantial evidence, that the crime was committed within the jurisdiction of the court, a new trial will not be granted, even though no witness specifically stated that the offense was committed within the county. Here there was enough to establish the venue. It appeared that the prosecutor lived in Walker County, and that he and his family were fired on while in his residence.

The defendant sought to establish an *alibi*, and also claimed that the offense, if any, was not assault with intent to murder T. B. Arnold, but his wife. It appeared that ten or twelve shots were fired into the house in which the prosecutor, his wife, and family were living. The prosecutor positively and explicitly identified the defendant, and it was for the jury to pass upon the conflict occasioned by this evidence and that of a witness who swore that at the time of the shooting he saw the defendant at a church four miles distant. It was also for

the jury to say whether the assault was with intent to murder the wife or the husband. There was evidence that one ball came within three inches of the wife, and another within eighteen inches of the husband. While the case is close under the evidence, there was sufficient to sustain the verdict, and, there being no error of law complained of, and no assignment of error on the charge of the court, we must decline to interfere with the refusal of the judge to grant a new trial.

The newly discovered evidence of other persons who were at the church was cumulative, and, besides, there was no showing by the defendant that he did not know, and by the exercise of ordinary care could not have discovered, the existence of such evidence.

Judgment affirmed. All the Justices concur.

STATE V. KIRBY.

62 Kan. 436—63 Pac. Rep. 752.

Decided February 9, 1901.

EVIDENCE—PRACTICE—PLEADING: *Two means of death charged in one count—Essential averments—Conversations between the deceased, the defendant and the defendant's wife—Right of the defendant to explain his meaning of words and expressions used by him previous to the homicide—Improper evidence as to other and distinct offenses—When evidence of matters of general repute is not admissible—No presumption that rumors derogatory of a daughter's character would reach the father.*

1. Murder may be committed by several means, and, where both shooting with a pistol and with a shotgun may have contributed to produce the death of the deceased, both means may properly be alleged in a single count of the information, and proof that death was caused by either will sustain the charge.
2. Following *State v. McGaffin*, 13 Pac. 560, 36 Kan. 315, it is held that the information herein contains the essential averments of a charge of murder.
3. A conversation participated in by defendant, his wife, and the deceased, and which was material in the case, was all admissible in evidence, including what was said between the defendant's wife and the deceased in the defendant's presence.
4. Testimony was offered by the State of ambiguous statements

made by the defendant before the homicide, which it is claimed indicated a purpose to take the life of the deceased. The defendant admitted the making of a part of the statements, and desired to explain his meaning, and the sense in which the words were used; but the court refused to hear any explanation as to what was in his mind when the statements were made, or of the intent with which the language was used. *Held* error.

5. Testimony as to the commission of offenses by defendant not in any way connected with that charged in the information, and which would tend to degrade and prejudice him, should be carefully excluded from the jury.
6. The general rule is that, where knowledge of an ultimate fact is in issue, testimony that it is a matter of general reputation in the community is competent, as tending to trace notice to the party sought to be charged; but such testimony is never admissible unless the person sought to be charged with notice stands in such relation or is so situated as to render it probable that he would be informed of what is generally known.
7. There is no such probability that neighborhood gossip and reports or reputation of the unchastity of a daughter will reach a father as to make such evidence receivable against him in a prosecution for murder, where his defense is that information of the seduction of the daughter excited him to uncontrollable passion, and to an insane impulse to kill the seducer.

(Syllabus by the Court.)

Supreme Court of Kansas.

Appeal from District Court, Jefferson County; Hon. Marshall Gephart, Judge.

Thomas C. Kirby, convicted of murder, appeals. *Reversed.*

Morse & Casebier and *David Overmyer*, for the appellant.

A. A. Godard, Attorney General; *Oscar Raines*, County Attorney, and *Shaeffer & Phinney*, for the State.

JOHNSTON, J. On the morning of December 21, 1899, Thomas C. Kirby shot and killed G. A. Foley at Perry, Kan. Kirby owned a hotel at Perry, which he managed and operated with the assistance of his wife and children. Foley was station agent for the Union Pacific Railway Company at that place, and lived at Kirby's hotel for some time before the homicide; and it is claimed that while there he seduced Clara Kirby, a daughter of the defendant. The seduction and condition of their daughter came to the knowledge of Kirby and his wife,

it is claimed, on December 14, 1899, when they had an interview with Foley, and endeavored to have him marry Clara, and, so far as possible make reparation for the wrong done her and her family. This he declined to do, and, when further pressed to marry the girl, stated that it was impossible to do so, as he had been married, and had a wife living. Clara was taken to Topeka by the defendant, where an examination was made by a physician, and his report confirmed the fears of the Kirbys as to the condition of their daughter.

In behalf of the defendant it is claimed that the disclosure and disgrace first stupefied him, and then, as he came to realize the real nature and effect of the wrong done to his daughter, and that there was no disposition on the part of Foley to make amends or to protect the reputation of the girl, he became more and more excited, and ultimately gave way to uncontrollable passion, and to the insane impulse to take the life of Foley, who had so greatly wronged his daughter and humiliated and degraded the family. His claim and testimony is that on the morning of the tragedy, one week after the disclosure, he went to the room of Foley, and demanded again to know what Foley was going to do as to his daughter, and was informed by Foley that he did not intend to do anything, when the defendant told Foley that he would prosecute him and put him behind the bars for his wrong and crime; that Foley thereupon rushed upon the defendant, declaring with an oath that he would kill him, whereupon the defendant drew his revolver to defend himself, but Foley grabbed the weapon, and, in the scuffle which followed the revolver was discharged, and the bullet struck the defendant's ankle and foot. The defendant finally gained control of the weapon and fired, striking Foley on the shoulder, and then the defendant laid down the revolver and took up a shotgun that was near by and shot Foley, who was still aggressively attacking him, the loads from both barrels taking effect in Foley's breast. Foley ran down-stairs and out of the house, pursued by the defendant, who was wild with excitement and passion, and who, with the revolver, which he had picked up again, fired another bullet into Foley's body. Foley fell on the sidewalk, and in a few minutes afterwards died.

On the part of the State it is claimed that Kirby was not greatly disturbed when he learned of his daughter's condition; that he allowed Foley to continue as a guest of the hotel for a

week following the disclosure; that, even if he had been excited and stirred to desperation when first told of his daughter's misfortune, there was a week of time for the cooling of his passions and in which to regain control of his reason; that his conduct in borrowing weapons, purchasing ammunition, and otherwise making preparations betrayed deliberation and a malicious purpose to kill, and this, with certain threats alleged to have been made by the defendant, and other testimony, tended to show that the killing was not done under any insane impulse or in self-defense. Kirby was prosecuted for murder, and the charging part of the information was as follows:

"That on the 21st day of December, A. D. 1899, in said County of Jefferson and State of Kansas, one Thomas C. Kirby, then and there being, did then and there unlawfully, feloniously, wilfully, deliberately, and premeditatedly, and with malice aforethought, kill and murder one G. A. Foley, then and there being, by shooting him, the said G. A. Foley, with a certain gun, commonly called a 'shotgun,' then and there loaded with powder and leaden shot and leaden bullets, and by then and there shooting him, the said G. A. Foley, with a certain pistol, commonly called a 'revolver,' then and there loaded with powder and leaden bullets, which said shotgun and said pistol, both as aforesaid loaded with powder and leaden shot and leaden bullets, he, the said Thomas C. Kirby, then and there in his hand and hands had and held. A more definite description of said shotgun and said pistol is to this informant unknown. Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Kansas."

Upon this charge a trial was had, which resulted in a verdict finding the defendant guilty of murder in the second degree.

In his appeal the defendant questions the sufficiency of the information, arguing that it is bad for duplicity, in that it charges two acts of killing, each with a distinct weapon, and that in fact two independent offenses are charged in a single count. This contention is not sound. Only one offense is charged, and that is the wilful, premeditated, and felonious killing of Foley by the defendant, at a stated time and place, by shooting him with a shotgun and with a revolver. Death may be produced or murder committed by several means, and, since both the shooting with the pistol and the shotgun may

have contributed to produce the death of Foley, both means may properly be alleged in a single count, and proof that death was caused by either of the means will sustain the charge. *State v. O'Neil*, 51 Kan. 651, 33 Pac. 287, 24 L. R. A. 555; *State v. Hewes*, 60 Kan. 765, 57 Pac. 959; *State v. Kornstett*, 62 Kan. 221, 61 Pac. 805.

While the information does not, in so many words, allege that the wounds were inflicted by the shooting, or that they were mortal and resulted in death, it does allege distinctly that Foley was killed and murdered by the defendant at a fixed place, and upon a certain time, by means that are described, and in language that can have no doubt as to the character of the wounds inflicted or the cause of the death. We think the information contains the essential averments of a charge of murder. *State v. McGaffin*, 36 Kan. 315, 13 Pac. 560.

Many exceptions were taken to rulings upon testimony, only a few of which require consideration and comment. The defendant sought to prove the provocation for the intense feeling and passion which possessed him when the killing was done, and was permitted to show the betrayal of the daughter, and a part of what was said at the conference which occurred between Foley and the defendant and wife shortly after the relations between Foley and the daughter had come to the attention of the defendant. What was said between Foley and the defendant that would stir the feelings and rouse the passions of defendant was received without objection, but when the conversation on the same subject between Foley and defendant's wife, in presence of defendant, was offered, a general objection was made, which the court sustained. The ruling was erroneous. All three participated in the interview, and what was said pertinent to the subject between Mrs. Kirby and Foley was just as competent as the conversation between Foley and the defendant. Whether this error alone is so prejudicial as to require a reversal, it is not necessary to determine.

Testimony was given of vague statements said to have been made by defendant, before the homicide, indicating a purpose to kill or get rid of Foley. In his testimony the defendant stated that he did say to a witness that one boarder had gone, and "that there would be some more in the same fix in a few days, or by to-morrow, or something like that." He was then

asked, "What did you mean by that?" But the court, on general objections, excluded the answer, or any explanation of what was in his mind, or to whom he referred in his statement. It was important testimony, and probably made an impression upon the minds of the jurors. The statements were offered by the State, and were interpreted as hints at violence and threats against Foley, who was killed the next day. The defendant admitted a part of the statements claimed to have been made by him, and desired to explain his intention, or the sense in which the words were used. He claims the explanation he would have made was that one of the boarders had failed to pay his board and had been turned away, and that he referred to another boarder, who was also in default, and would also be turned away. The statements used were open to more than one interpretation, and the defendant, who was on trial for his life, was certainly entitled to tell the jury what his intention was.

In *Gardom v. Woodward*, 44 Kan. 758, 25 Pac. 199—a case involving the good faith of the transfer of property—it was held that the party might testify directly as to this intention and the state of his mind with respect to the transfer. In deciding the case it was said: "The condition of a man's mind, with reference to what he thinks, feels, believes, intends, and his motives, is always a fact, and it is a fact which is often required to be ascertained both in civil and criminal cases; and only one person in the world has any actual knowledge concerning that fact, and that person is the one whose condition of mind is in question; and where he is a competent witness to prove such condition he may testify to the same directly." See, also, *Bice v. Rogers*, 52 Kan. 209, 34 Pac. 796.

The testimony against the defendant of the implied threats, was admitted to show a criminal intent, and, since intent may be thus proved indirectly, no reason is seen why it may not be proved directly; and his testimony of the meaning and intent of the language used, instead of being a mere inference, is based on consciousness and actual knowledge. See, also, *Com. v. Woodward*, 102 Mass. 155; *Seymour v. Wilson*, 14 N. Y. 567; *Nash v. Trust Co.*, 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753; *Abbott Trial Ev.* 780; *Whart. Ev.* § 508; 14 Alb. Law J. 387.

The defendant's wife was called as a witness in his behalf,

and on cross-examination the court, over objection and protest, permitted the State to ask a number of questions as to other and distinct offenses committed by the defendant, and which would tend to blacken and degrade him in the eyes of the jury. She was interrogated as to whether he had not maintained a "joint" in the hotel, and harbored lewd women there, and whether he had not used and permitted the use of rooms in his hotel for gambling purposes. To most of the inquiries she gave a negative answer, but the State was thereby allowed to insinuate charges and offenses other than the one alleged in the information, and the questions implied an assertion of belief on the part of the attorneys for the State that the defendant was guilty of the other offenses. In respect to keeping gambling rooms, the witness said that she did not know that the defendant did carry on or allow gambling in the hotel, but on persistent questioning she was compelled to admit that she had seen men playing cards in the rooms of the hotel, but did not know that they were gambling. The charge of gambling imputed by this question is a felony, and it has no connection whatever with the offense of murder, which was in issue, and there is no justification or excuse for the allowance of these questions. To a series of questions the witness was required to answer whether the defendant had not permitted lewd women to come and stay at the hotel for days at a time, and whether at times within two years prior to the homicide the defendant had not required her to carry refreshments to rooms occupied by lewd women. To these questions her answers were substantially in the negative form, but they were qualified by stating that it was not within her knowledge, and not within her memory. Another question admitted over objection was whether her husband had not for a long time prior to December 1, 1899, run a joint in room No. 6 of that building. She answered the question by saying that people said that he did, and that she did not see anything sold; and, when inquiry was made as to whether she did not know it, her answer was, "I do not suppose I knew it." The court struck out her answer that people said he ran a joint, and allowed the remainder to stand. These offenses and misconduct, which were made the subject of inquiry, were not linked in any way with the offense charged in the information. The general rule is that the charge upon which a person is being tried cannot be supported by proof that he committed other offenses, even of a similar nature. Evidence which legitimately

tends to support the charge, or show the intent with which it is committed, is not to be excluded on the ground that it will prove other offenses, but the other offenses inquired about in this case do not fall within any of the exceptions to the general rule. Presumably, the defendant came to the trial prepared to answer the charge of murder, but, since no other charge was made against him, it is not to be expected that he was prepared to answer the offenses of the unlawful sale of liquor, or the keeping of a gambling establishment or a house of prostitution. The allowance of the questions, which were persistently put with the sanction of the court, together with the halting and qualified answers of the witness, was a manifest injustice to the defendant, and must have created a prejudice in the minds of the jury against his general character.

A number of witnesses were called by the State to testify to the character of Clara Kirby for chastity and virtue. The form of the question put was whether the witnesses "knew her reputation for chastity and virtue prior to December 21, 1899," and in this way evidence of an impeaching character was elicited. The questions, if relevant and competent for any purpose, were objectionable in form. When character is in issue, the law limits the inquiry to general character, and not to specific acts—not the estimate of a few nor the opinion of a part of the community; but it can be shown only by common report, general reputation, and opinion generally entertained of the party in the community where he lives. The questions asked did not call for general reputation; but is the character or reputation of a person other than the defendant a proper subject of inquiry?

Prosecutions are very rare where evidence of the general character of any one besides the accused is admissible. Of course, the character of a witness in the case is open to attack, but there the inquiry is limited to the general character of the witness for truth and veracity. *State v. Eberline*, 47 Kan. 155, 27 Pac. 839. While Clara Kirby was a witness in the case, the challenged testimony was not admitted to impeach her credibility, and the jury were instructed that it was not competent for that purpose. In trials for seduction and rape the character of the prosecutrix for chastity is involved, and proof like that in question may be received. So, also, is character directly in issue in libel cases; and the character of the deceased may be the subject of inquiry in some cases of

homicide, where the claim is that the defendant acted in self-defense. It is easy to understand why the law permits an examination into character in these as well as in a few other cases that might be mentioned; but in none of them is the issue of character so remote, or a showing by testimony of reputation so questionable, as in the case before us. The moral character of the defendant could not be attacked by the State unless he offered evidence of his good character, and yet here the State was allowed to produce evidence of the moral character of an outside party against the defendant, when the issue was his guilt or innocence of a charge of murder. The State contends that it was competent to trace knowledge of his daughter's unchastity to him, because of his claim that the knowledge of the seduction excited his passions and drove him to desperation and to kill the seducer, and that, if such knowledge was traced to him months before the homicide, the claim that his mind was unhinged by the story of the seduction would be contradicted and overthrown. If it be assumed that he had heard reports derogatory of his daughter's character, who can say that information from herself of her seduction by a guest of the house, and of her pregnancy, would not arouse his passions or affect his mind? Again, who can say that reports of the unchastity of a daughter would probably come to a father, and that, if any one was so bold as to repeat to him rumors impeaching her virtue, he would believe them? Our attention is called to the general rule that, where knowledge of an ultimate fact is in issue and provable, evidence that it is a matter of general reputation is competent, as tending to trace notice to the party sought to be charged with notice; but such proof is never admissible unless the person sought to be charged with notice stands in such relation or is so situated as to render it probable that he would be informed of what was generally known. Counsel for defendant well say that the father would be the last one to hear reports of the lewdness of a daughter. All know that any ordinary person would not only hesitate to believe such rumors, but would also shrink from relating them to the father or speaking of them in his presence. The cases in which people would carry gossip as to the unchastity of wife, daughter, or sister to the male members of a family would certainly be exceptional, and would never occur except under extraordinary cir-

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cumstances. Instead, then, of its being probable that the father would be informed of these reports, we think it contrary to all reasonable expectation, and that they might be heard by almost every one in the community, and yet the father be in complete ignorance of them. Again, if a bad general reputation of the daughter was shown to exist, and that notice of the same had been brought to the father, his belief in the reports must still be assumed, in order to say that his mind was not affected when he heard from his daughter's lips the story of her seduction by Foley. How can any matter of fact be assumed against a defendant charged with murder, where the law requires that every just presumption of fact, as well as every reasonable doubt, must be resolved in his favor. As we have seen, it was unlikely that he would hear the reports, and without other and better testimony, it is contrary to reason to hold that he would believe them; and, if he did not give them credence, he was necessarily in the same situation, and would be affected by the story of the seduction the same as though he had not heard the reports. It should be said that, aside from the opinions of the witnesses as to reputation, there is no testimony showing that the defendant ever heard a whisper or entertained a suspicion against his daughter's character until he heard the story of her seduction by Foley. Our conclusion is that the testimony, even if it had been in proper form, was inadmissible as against the defendant. *Tucker v. Constable*, 16 Or. 407, 19 Pac. 13; *Carter v. Carter*, 62 Ill. 439; 5 Am. & Eng. Enc. Law (2d ed.) 871; Gillett, Ind. & Col. Ev. § 296.

Other objections to the exclusion of testimony are taken, but they are rendered immaterial by the fact that subsequently the court admitted the testimony in answer to other questions. Some other exceptions are taken, but they do not appear to us to be sufficiently material to require particular attention or comment; but, for the errors pointed out, the judgment must be reversed, and the cause remanded for a new trial.

RICHARDSON V. STATE.

90 Md. 109—44 Atl. Rep. 999.

Decided November 24, 1899.

EVIDENCE—IDENTIFICATION—IMPEACHMENT: *Identification controverted by experiments—Offer to impeach prosecuting witness by showing corrupt methods employed to suppress, and, to procure testimony.*

1. The accuser testified that the accused fired at him and ran, the accuser returning the fire and pursuing him. Two witnesses for the State testified that about 8:10 P. M. the same evening they heard the shots and about five minutes later saw the defendant pass under a street lamp, and that they well knew him, and identified him. For the defense it was offered to prove, that a few days later, near the same hour at night, three persons of good sight, by way of experiment, from the same place viewed two persons dissimilar in appearance pass under the same street lamp, and that they could not identify them or distinguish them from each other. This evidence was rejected, which ruling is held to be reversible error.
2. The prosecuting witness on cross-examination denied that he had offered to pay one of the witnesses for the defense to be absent from the trial; and also denied that he had offered to purchase testimony for the prosecution. *Held*, that the defendant was entitled to introduce testimony to contradict him in each of these regards.

Maryland Court of Appeals.

Appeal from the Circuit Court of Washington County;
Hon. Edward Stake, Judge.

Harold B. Richardson, convicted of assault with intent to kill, appeals. Reversed.

M. L. Keedy and *Jos. W. Wolfinger*, for the appellant.

George R. Gaither, Jr., Attorney General; *C. D. Wagaman* and *C. D. Little*, for the State.

PEARCE, J. The appellant was convicted in the Circuit Court for Washington County of assault with intent to kill Arthur L. Towson by shooting him with a pistol. During the course of the trial three exceptions were taken by the traverser to the exclusion of testimony offered by him, and these ex-

ceptions present the only questions for our determination. We will state such of the facts as are necessary to a proper understanding of the disposition of these exceptions. The shooting occurred at 10 minutes after eight o'clock on the evening of May 2d, in a lane in Smithburg, and there was no one present but Towson and the person who did the shooting. Towson testified that as he passed down the lane, he saw a man behind a tree; that he had been shot at by some unknown person, near the same spot the night before; that he advanced to the tree, and saw the person full in the face, and recognized the traverser, whom he had known for years; that the traverser stepped around the tree, and with his left hand fired at him and ran; that he returned the shot and pursued; that several running shots were exchanged, and the traverser escaped; that later, about nine o'clock, he went to the post-office and saw the traverser sitting with Harry Embley, at Brenner's corner.

On cross-examination, he said he had heard Marshall Hoffman say, he had seen the traverser at Hoffman's Corner, at the very time of the shooting, and that he went on May 4th to see Marshall's father, Charles Hoffman, about it, and had a conversation with him. He was asked if he did not tell Charles Hoffman if he would send Marshall away until after the traverser's trial, that he, witness, would pay him wages during the time and expenses, and he denied making such statement. He was also asked if he did not subsequently return and ask Charles Hoffman not to say anything about that conversation, to which he replied that he had heard Marshall was scared about being summoned, and he went back and told his father that Marshall could avoid being summoned by going away. Being then asked if he was concerned about Marshall, he replied, "one for him and two for me."

Charles Hoffman, for the defense, testified that Towson came to his shop May 4th, and among other things, said: "I did not quite get him (meaning the traverser) last winter, but I will get him now," and offered further to prove by him, that at the same time Towson asked what Marshall was doing, to which he replied that he was working when he could get work, and Towson said, "if you will send him away until after trial of Richardson's case, I will pay him wages and expenses," but that he rejected the proposition, and said his

son should testify if summoned to whatever he knew; and that Towson then left, but subsequently returned and asked him to say nothing about what he proposed to him. This proffered testimony was excluded, and its exclusion constitutes the first exception.

To corroborate Towson's identification of the traverser, Blanche Donaldson and Claude Ferguson testified that on the evening of May 2nd they were sitting on a bench at the railway station at Smithsburg, and heard a pistol-shot in the direction of Towson's lane, at ten minutes after eight o'clock, and several shots a few minutes later; that about five minutes after the shooting, some person ran down the road to the railroad, and as he passed under the street lamp they both recognized him as the traverser, whom they knew well. To contradict this testimony, the traverser proposed to show by John Unger and three other witnesses, all young men with good eyesight, that on Saturday and Sunday evening, May 27th and 28th, at 8:45 o'clock, they were in the seat occupied by Blanche Donaldson and Claude Ferguson on May 2d, and that each of those evenings was clear, and the same street lamp, in the same condition as on May 2d, was burning with its usual brightness; that while they were thus seated, two persons, in pursuance of previous arrangement, both well known to all of them, but neither resembling the other, came, one at a time, from Towson's lane, passed over the railroad and under the street lamp, as it had been testified the traverser did, and that it was impossible for any one of the four present to identify either person so passing, or to determine which of the two came first, and that no changes had taken place in the surroundings of the seat or of the lamp, except that the foliage of a locust tree near the lamp was denser on the last occasion, but that it did not obscure the view from the seat to the lamp; and proposed further to ask these witnesses, from the observations made by them, whether, in their opinion, it would be possible to distinguish the traverser from Percy Embley, under the circumstances testified to by Blanche Donaldson and Claude Ferguson—Percy Embley having testified that he fired the shot in joke, and then ran past the station and street lamp in the manner described. The court excluded the testimony thus offered, and its exclusion constitutes the second exception. On cross-examination Towson was asked if he did

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not call on M. Carper on May 4th, at his hotel, and ask him if he did not know something about Richardson shooting at him, to which Carper replied, "Nothing but hearsay, and that does not count," and if he (Towson) did not then say, "Mr. Carper, we propose to pay for our evidence, and pay well for it"—all of which Towson denied. The traverser subsequently offered to show by Carper that Towson did make the statements which he denied, but the court refused to allow the contradiction, and this refusal constitutes the third exception. The first and third exceptions may be conveniently considered together, and the second exception will be first considered.

It appears from examining the testimony of Blanch Donaldson and Claude Ferguson, that though they saw the person full in the face as he came down the road, they did not identify him until he passed the lamp, which was 94 feet from them. Their sole means of identification was the light of the street lamp at the moment when the side of his face, 94 feet distant, was turned to them. While their testimony is positive and unqualified, it can, from its very nature, indicate only their conviction or opinion resulting from the facts observed by them, and might or might not be satisfactory to others with the same opportunities for observation, and the same acquaintance with the traverser. It was proper testimony, and, unchallenged, would doubtless be accepted as convincing. But let us suppose that the witnesses whose testimony was excluded had been sitting beside Misses Donaldson and Ferguson at the moment this person passed, and that their knowledge of Richardson and their capacity for observation were equal in all respects to that of Misses Donaldson and Ferguson, and that they had been called by the defense to prove that, notwithstanding these facts, not one of the four was able to identify the person passing, can it be supposed that their testimony could have been properly excluded? And, if not, is there any rational ground, either in common experience, or in the rules of evidence, upon which it should be excluded as it was offered? The testimony of Miss Donaldson and Ferguson was but their narration of the effect produced on their minds by the facts observed, but upon sound legal principles it becomes primary evidence, because the conditions producing that effect could not be reproduced in concrete form to the jury. Wharton says this is especially true

in questions of identification, "where a witness is allowed to speak as to his opinion or belief" (Whart. Cr. Ev. § 459; and again, he says, in section 807, "In questions of identity we have, after all, to go back to opinion." In *Com. v. Dorsey*, 103 Mass. 420, Chief Justice Chapman said: "In testifying to the identity of a person, the statement often can be nothing more than belief or opinion. This is especially so when the person is seen in the night, or at a distance, or for a very short time." And in the case before us, all the elements of uncertainty and doubt mentioned by him are found. The cases show that whenever the witness has had the means of observation, and the facts and circumstances which lead his mind to a conclusion are incapable of being detailed and described so as to enable any one but the observer himself to form an intelligent conclusion from them, the witness is allowed to give his own opinion, or the conclusion of his own mind. This is the principle upon which the testimony of Miss Donaldson and Ferguson had value, and was admitted, and upon which the testimony of Unger and his companions, if they had been present also, whatever the result of their observation, whether to confirm or contradict, would have been equally admitted. But it may be said their observation was not of the same facts, but was a mere experiment; the observation of other, though analogous, facts, and therefore neither these facts nor the opinion resulting therefrom are admissible. Upon principle we can discover no sound cause for such distinction. If the brilliancy of the lamp at that point on May 2d was such as to enable Miss Donaldson and Ferguson to identify Richardson under the circumstances stated, it should have enabled Unger and his companions, on May 27th and 28th, their vision being equally good, to identify a person equally well known to them, under precisely similar conditions and circumstances. This is a proposition which ought not to require argument for its support. The record shows that the conditions were as nearly identical when the experiments of Unger were made, as it was in human care and caution to have them. The seat at the railroad and the street lamp were the same, and in the same locations; the lamp was burning with the same power and brilliancy; the season of the year and the atmospheric conditions were the same; the hour about 35 minutes later only, but at that date the sun

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set 25 minutes later than on May 2d, and the decline of the natural light must have been about the same; no cause can be suggested for any difference in the diffusion of light from the lamp, and there was no change in any of the surroundings of the place.

In *Yates v. People*, 32 N. Y. 509, where the question was the capacity of the traverser to identify the deceased, whom he had killed, as a police officer, by his uniform, cap and shield, by the light of a street lamp, at 9 o'clock on the evening of October 1st, evidence was offered of an experiment, made January 21st following, at the same lamp and the same hour, and the evidence was excluded; not, however, because it was *per se* inadmissible, but because the seasons of the year were different, involving probable different atmospheric conditions, and because there was no offer that the conditions and power of the light were the same, or that the general surroundings were the same. But in *Chicago, St. Louis & P. R. R. v. Champion* (Ind. Sup.) 32 N. E. 874, 23 L. R. A. 861, where an accident had occurred in the management of a hand car, evidence of an experiment with a similar car, with the same brakeman in charge, on the same siding, and under the same circumstances, was held, on appeal, to have been improperly excluded by the trial court. The case of *Smith v. State*, 2 Ohio St. 511, presents an interesting examination by Judge Thurman of the legal principles by which such evidence should be tested. Holcombe had been fired upon, at night, through the window of a tavern, while stooping to take some books from a table near the window. He testified that he saw, through the glass, a man very close—with arm extended, and a pistol in his hand, directed at him, and that he *thought* it was the defendant; that at the moment the pistol was discharged, and by the flash, he distinctly saw and positively recognized the defendant. The State also examined other witnesses, not present at the shooting, as to experiments and observations made by them at that window, under the same circumstances in all respects as those of the actual shooting, and as to their opinion of the results, for the purpose of proving by inference from such observations, that Holcombe could have seen and recognized the defendant, as he swore he did. The defendant then offered to prove by other witnesses that shortly after the shooting, at another spot than that where

it had occurred, they had made experiments as nearly as possible similar in all respects to those of the State, and that though they could see the person on the outside of the window, they could not distinguish or identify him, either before the firing, or by the flash at the discharge of the pistol. The trial court excluded all the facts offered in evidence, but permitted the witness, as an expert in the laws of light and vision, to state his opinion as to the effect of the sudden light made by the discharge of the pistol. The exclusion of the facts and of the resulting opinion thereon was held error by the Supreme Court, Judge Thurman saying: "It was certainly lawful to disprove Holcombe's statement by showing the impossibility, or the natural improbability of its being true, but it is said this could not be done by proof of experiments. If not, how could the proof be made? No one but Holcombe was looking through the window when the crime was committed. No one but he saw the pistol fired, or the person who did it. Direct contradiction by eye-witnesses was therefore impossible, and would perhaps be equally impossible in a large majority of the cases. Unless, then, proof of experiments is receivable, a man is very much at the mercy of another who swears against him, and perjury, or mistake, however great, instead of incurring punishment or being rectified, may answer to produce conviction. It was also argued that the State cannot come prepared to meet proof of facts that are not part of the *res gestæ*. But the credibility of testimony is always in issue, and the State must come prepared to maintain the credibility of hers. Finally it is said that notwithstanding the result of the experiments, it is possible Holcombe saw what he said he did. Granted. But what of that? It was not indispensable to the defense to prove the utter impossibility of his statement. Evidence that tended to show its improbability was competent, and such evidence, if it did not convince, might at least have raised a reasonable doubt in the minds of the jury." These observations are so sensible and just; they come from so high a source, and throw so clear a light upon the question before us, that we have felt justified in repeating them, and we are clearly of opinion that the evidence offered under the second exception was competent, whatever may be its weight, and should have gone to the jury for their consideration.

The first and third exceptions are substantially the same. The first presents the question whether one who has denied offering a bribe to a witness to prevent his giving testimony in that cause, may be contradicted by the person to whom the bribe was offered. The third is, whether the same witness who has also denied offering a bribe to another witnesses to induce him to testify in that cause, after the witness has informed him he knows nothing but hearsay, may be contradicted in like manner. It was contended that he cannot, because of the well-established rule of evidence, that where a witness on cross-examination has answered a question collateral to the issue, such answer cannot be contradicted. But this rule leaves undeclared what is within the cases, irrelevant or collateral for the purpose of excluding the contradicting evidence. In the leading case of *Attorney General v. Hitchcock*, 1 Exchequer 91, Chief Baron Pollock says: "The test whether the matter is collateral is this: if the answer of a witness is a matter which you would be allowed on your part to prove in evidence; if it have such a connection with the *issue* that you would be allowed to give it in evidence, then it is a matter on which you may contradict him." In that case, it was held that a witness who had denied on cross-examination that he had said the officers of the crown had offered him a bribe to testify as he did, could not be contradicted by proof that he had so said, and we have no occasion to doubt the correctness of that decision. As was said in the course of that opinion: "It is totally irrelevant to the matter in issue that some person should have thought fit to offer a bribe to the witness to give an untrue account of a transaction, and it is of no importance whatever, *if that bribe was not accepted*. It is no disparagement to a man that a bribe is offered to him. It *may be a disparagement to the person who makes the offer*. *Lord Stafford's Case*, 7 How. St. Trials, 1400, was totally different. There the *witness* himself had been implicated in offering a bribe to some other person. That immediately affected him as proving that he had acted the part of a suborner for the purpose of perverting the truth. In that case the evidence was to show that the witness had offered a bribe in the *particular case*, and the object was to show that he was so affected towards the party accused as to be willing to adopt any corrupt course in order to carry out his purpose." And

Baron Alderson said in the same case: "The evidence is receivable as tending to show that the man who himself came to give evidence against Lord Stafford, was embittered against him, and had endeavored to persuade other people to give false evidence on the same side. That had a tendency to show that his testimony could not be relied on by the jury." In *Regina v. Burke*, 8 Cox. Crim. Cases 44, the above case was reviewed by nine judges and was held to have placed the rule of law upon reasonable ground, and all the judges agreed that the rule of exclusion does not embrace cases "where the matter inquired into is of a kind which brings a witness into special connection, in some way, with the subject of the issue, or with one of the parties to the issue, as where the matter inquired into is whether the witness has not received a bribe from one of the parties, or whether the witness was not living as the mistress of one of the parties." The inquiry in the case before us, is precisely that in *Lord Stafford's Case* (7 Howell's State Trials, 1400), and falls directly within the reasoning of *Regina v. Burke*, *supra*, and of *Moriarty v. London and Dover R. W., L. R.*, 5 Q. B. 319, where Chief Justice Cockburn said: "If you can show that a plaintiff has been suborning false testimony it is strong evidence he knew perfectly well his cause was an unrighteous one, and it is evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts, inasmuch as it goes to show he thinks he has a bad case." Here the witness is not technically a party, but, as prosecuting witness, his position, for the purpose of this inquiry, is not distinguishable from that of a party. In *Wise v. Ackerman*, 76 Md. 394, 25 Atl. 424, it was proposed, on cross-examination of a witness testifying for plaintiff in a damage suit, to ask whether he had not said, in urging settlement of another damage suit, that he, as a medical witness in a former trial of the then pending case, had been instrumental in getting a big verdict for the plaintiff; and the question was not allowed. Upon appeal this court reversed the judgment, Chief Justice Alvey saying: "It was clearly within the scope of proper cross-examination, and, upon the witness denying the use of the language imputed to him, it could be competent to prove what he did say, not with the view of having a direct effect upon the issue, but to show what was the state of mind of the

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witness, his relation to the plaintiff, and his motive and temper in the particular transaction, so as to enable the jury to determine the weight due to his testimony; and this is in no proper sense collateral to the inquiry." We think the testimony excluded under the first and third exceptions should have been admitted.

Judgment reversed, and cause remanded for a new trial.

STATE v. MILLER.

153 Ind. 229—54 N. E. Rep. 808.

Decided October 12, 1899.

FALSE PRETENSES—INDICTMENT: *Insufficiency of the indictment—Failure to aver ownership of money obtained, and of consummation of inducing cause.*

1. In an indictment for obtaining money by false pretenses, the ownership of the money alleged to have been obtained must be stated.
2. The relation of the false pretenses, as an inducing cause, to the obtaining of the money, should be averred.
3. The indictment charged, that the accused, with intent to defraud another, and, to induce him to purchase a horse, made certain false pretenses as to the ownership of the horse, and did thereby obtain from him ten dollars; but, the ownership of the money was not averred, nor, was it averred that the sale was consummated. *Held*, that the indictment was insufficient.

Supreme Court of Indiana.

Appeal from Circuit Court, Elkhart County; Hon. Henry D. Wilson, Judge.

Edward Miller, indicted for obtaining money under false pretenses. Indictment quashed. The State appeals. Affirmed.

Chas. G. Sims, Prosecuting Attorney, and *W. L. Taylor*, Attorney General, for the State.

Lou W. Vail, for the appellee.

DOWLING, J. This was a prosecution under § 2204 R. S. 1881, § 2352 Burns 1894, for obtaining money by false pre-

tenses. On the motion for the appellee, the indictment was quashed on the ground that it did not state facts sufficient to constitute a public offense. The Prosecuting Attorney excepted to the opinion of the court upon the point of law so presented, and reserved it for decision upon an appeal to this court.

The indictment was in these words (title and indorsement omitted): "The grand jury of the County of Elkhart, and State of Indiana, upon their oath do charge and present: That on the 4th day of March, 1899, at the County of Elkhart, and State of Indiana, one Edward Miller did then and there feloniously, unlawfully, and falsely pretend to one Robert White, with intent then and there, and by such false pretense to cheat and defraud the said Robert White, for the purpose of inducing the said Robert White to buy a certain bay horse, and of obtaining from the said Robert White a certain sum of money, to-wit, the sum of ten dollars, good and lawful money of the United States of America, then and there of the value of ten dollars; that the said Edward Miller was then and there the owner of, and had the right to sell, the said bay horse then and there being; that the said Robert White, relying upon the said representations of the said Edward Miller, and his false pretenses as aforesaid, and believing the same to be true, and being thereby deceived, and having no means of ascertaining the contrary, did then and there, upon the said day, give to the said Edward Miller the said sum of money, to-wit, ten (\$10) dollars, and the said Edward Miller did then and there, and thereby receive and obtain possession by means of his false pretenses, as aforesaid, of the said sum of money, to-wit, ten dollars, to the injury of the said Robert White; whereas, in truth and in fact, said false representations and pretenses were wholly false, and the said bay horse was not then and there the property of the said Edward Miller, but of another person, and the said Edward Miller had no right to sell the said bay horse, as the said Edward Miller then and there well knew, contrary, etc. Chas. G. Sims, Pros. Att'y."

The ruling of the Court upon the motion to quash was clearly right. The indictment was fatally defective in at least two particulars. It failed to state the ownership of the \$10 alleged to have been obtained from White, and it showed no

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connection between the false pretenses and the payment or delivery of the money by White to the appellee.

It is said in *State v. Smith*, 8 Blackf. 489: "It is not necessary to express an opinion upon the point in this case, as the count of the indictment now under consideration is clearly bad in not alleging the ownership of the goods obtained. 3 Chit. Cr. Law, 999; Whart. Cr. Law, 465; *Reg. v. Parker*, 3 Adol. & E. (N. S.) 292; *Reg. v. Norton*, 8 Car. & P. 196; *State v. Lathrop*, 15 Vt. 279."

Again, in *Leobold v. State*, 33 Ind. 484, the Court say: "No ownership of the money obtained is alleged in the indictment. This is essential, as has heretofore been determined by this court. *State v. Smith*, 8 Blackf. 489. That it was money obtained in this case, instead of other property, can make no difference, that we can perceive, in respect to the necessity of an allegation of ownership. The case of *Reg. v. Norton*, 8 Car. & P. 196, cited in *State v. Smith*, *supra*, was a case of the obtaining of money, in which it was held that an allegation of ownership was essential."

The representations set out in the indictment indicate that their object was to induce White to purchase a horse; but it does not appear that they were effective for that purpose, or that any sale of the horse was made. There is no charge in the indictment that the false representations were made to obtain credit, but it is alleged that they were made "for the purpose of inducing the said Robert White to buy a certain bay horse, and of obtaining from the said Robert White a certain sum of money, to-wit," etc. As no sale of the horse took place, no connection is shown between the alleged pretenses and the delivery of the \$10 to appellee. It is said in *Com. v. Strain*, 10 Mete. (Mass.) 521, cited in *State v. Williams*, 103 Ind. 235, 2 N. E. 585, "that the sale or exchange ought to be set forth in the indictment, and that the false pretenses should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be."

There was no error in the ruling of the court, and the judgment is affirmed.

STATE V. RILEY.

65 N. J. L. 624—48 Atl. Rep. 536.

Decided March 4, 1901.

FALSE PRETENSES—VARIANCE: *Testimony must be confined to the averments in the indictment—Evidence insufficient.*

On trial of an indictment for obtaining money by false pretense, it is error to permit the jury to convict for falsity not alleged in the indictment.

(Syllabus by the Court.)

(The court also strongly intimates that the prosecution failed to make out a case independent of the indictment.—J. F. G.)

Court of Errors and Appeals of New Jersey.

Error to the Supreme Court.

James Riley was convicted of obtaining money by false pretenses. This conviction was affirmed by the Supreme Court. (65 N. J. L. 192: 46 Atl. Rep. 700.) The defendant brings error. Reversed.

Clarence Linn, for the plaintiff in error.

James S. Erwin, Prosecutor of the Pleas, for the State.

COLLINS, J. The indictment in this case was for obtaining money by false pretenses. It alleged that the defendant, in order to induce a contract of purchase of certain land by one John McGrath, did on February 7, 1894, represent that he owned the land unincumbered; and afterward, in order to induce the payment of an installment of the purchase price, did, on March 7, 1898, falsely pretend that the title was still unincumbered, when in fact such title was then incumbered by a mortgage that he had given shortly after the making of the contract. The proof at the trial was that at the time of the contract the land embraced therein was owned by one Brinkerhoff unincumbered, and on March 23, 1894, was by him sold and conveyed to the defendant, who on the same day gave a mortgage upon it. No representation at any other time than on February 7, 1894, was proved; the trial court submitting the case to the jury on the theory that silence might constitute a continuing misrepresentation. Intentional falsity of the

original representation of ownership was expressly submitted as warranting conviction. This was erroneous. It doubtless escaped the notice of the trial court, as well as of the Supreme Court on review, that the indictment does not negative the fact of the defendant's ownership. The only false pretense averred is that the land was on March 7, 1898, unincumbered. It is well settled in this State that, in an indictment for obtaining money by false pretenses, every misrepresentation relied on for conviction must be set out with sufficient particularity to apprise the defendant of the case he must meet. Both the representation and its falsity must be pleaded in due form. *State v. Tomlin*, 29 N. J. Law, 13, 25; *Roper v. State*, 58 N. J. Law, 420, 33 Atl. 969; *Oxx v. State*, 59 N. J. Law, 99, 35 Atl. 646. This court, in *Cunningham v. State*, 61 N. J. Law, 666, 40 Atl. 696, explicitly declared this rule, and at the present term, in *State v. Luxton*, 65 N. J. Law, 605, 48 Atl. 535, has re-declared it, although holding that defects of pleading may be cured by verdict. It follows that evidence not within the allegations of the indictment is incompetent to induce a conviction. As was said in a case like the present, by Chief Justice Beasley, it is a familiar and rudimentary principle that the *allegata* and *probata* must correspond. *Harris v. State*, 58 N. J. Law, 436, 33 Atl. 844. If incompetent evidence gets into the case, the court should protect the defendant against it by appropriate instruction to the jury. In the charge under review such evidence was submitted as if competent, and the general exception taken by the defendant must prevail, to overthrow the verdict. This leads to a reversal of the judgment of conviction, but to no defeat of justice.

As to ownership: The written contract delivered to McGrath, and offered in evidence by the State, although signed without a designation of agency, was by its terms made "subject to the owner's approval." Except for testimony that the purchaser could not read, the trial court would hardly have submitted to the jury the question of whether the defendant represented himself to be owner; and, in light of all the evidence in the case, a finding of such a representation was not justifiable.

As to incumbrance: Brinkerhoff would not approve the contract, and in order to carry it out the defendant purchased

the land. He raised the money to do so by means of a mortgage to a building and loan association. Whether or not he informed McGrath of this mortgage was at the trial a disputed question, which, because of its submission to the jury blended with the question of the original representation of ownership, was not settled by the verdict. This mortgage was reduced as McGrath paid the installments on his contract. The payment of March 7, 1898, which is the subject of the indictment, left due on the contract the sum of \$150. By the State's proof it appeared that no more than that sum was due on the mortgage when it was afterwards foreclosed. McGrath was in no way defrauded in his payment of March 7, 1898. He made but one more payment, namely, \$50, and with that the present indictment does not deal. We have not considered the question of whether the true representation of February 7, 1894, that the land was unincumbered, could, by the mere receipt in silence of installments on the contract, become a false pretense that it was on March 7, 1898, still unincumbered. The judgment of the Supreme Court and that of the Sessions must be reversed.

STATE V. MURPHY.

68 N. J. L. 235—52 Atl. Rep. 279.

Decided June 9, 1902.

FALSE PRETENSES—INDICTMENT: *Wherein the pretense was false should be specifically set out.*

Where, in an indictment for obtaining money under false pretenses, the representations alleged consist of a series of interdependent statements, the allegation of falsity must not be negatively pregnant, but sufficiently certain and specific to enable the person charged to intelligently prepare his defense.

(Syllabus by the Court.)

Supreme Court of New Jersey.

Engene Murphy, indicted for obtaining money under false pretenses, moves to quash the indictment. Indictment quashed, Argued February term, 1902, before DIXON and COLLINS, JJ.

James S. Erwin, Prosecutor of the Pleas, for the State.
McEwan & McEwan, for the defendant.

COLLINS, J. The defendant moves to quash the indictment certified in this case, which was for obtaining money under false pretenses, by inducing one August Doppe to cash for the defendant a paper-writing dated November 30, 1899, purporting to be a check of one Sarah Lines on the First National Bank of Hoboken for \$11.50, payable to the order of the defendant. The pretenses set forth were "that the said paper-writing was then and there a good and *bona fide* check and order for the payment of money of tenor and effect aforesaid, there and theretofore taken by the defendant in good faith from the drawer of said check." The falsity of the pretenses was alleged in the following words: "Whereas, in truth and in fact, the said certain paper-writing was not then and there a good and *bona fide* check and order for the payment of money, of tenor and effect aforesaid, nor for the payment of any money whatsoever; nor had he (the defendant) there and therefore, nor at any time and place, taken and received the said paper-writing purporting to be a check as aforesaid from one Sarah Lines, drawer as aforesaid. All of which said pretense and pretenses as aforesaid he (the defendant) then and there well knew to be utterly untrue, false, and unfounded in fact."

In our judgment this indictment is too uncertain to call on the defendant to plead it. Both the common law and the Constitution of this State exact that there shall be a description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted sufficient to identify the accusation so that the accused may prepare his defense. *State v. Spear*, 63 N. J. Law, 179, 34 Vroom 179, 42 Atl. 840, and cases cited.

The general rule is that the indictment must state the facts of the crime with as much certainty as the nature of the case will reasonably admit, and that an indictment for false pretenses should negative the pretenses by such specific averment as will give the defendant notice of what he has to prepare to defend. *State v. Luxton*, 36 Vroom 605, 48 Atl. 535.

Where the pretense set up is affirmative and single, it is usually sufficient to merely allege its falsity; but, where it consists

of a series of interdependent statements, the allegation of falsity should not be negatively pregnant.

In the indictment before us it cannot be told whether the State intends to prove that the check cashed was a forgery, or drawn on a bank in which the drawer had no funds, or not taken in good faith from the drawer, or not received at all from the drawer, or even not of the tenor and effect represented; for it is not alleged that the person defrauded saw the check before paying his money. It is impossible for the defendant to learn from the indictment what state of facts he will be called upon to meet.

It is contended from the State that the allegation of false pretenses in this indictment may be treated as surplusage, and the indictment held good under the 186th section of the Crimes Act (P. L. 1898, p. 845), as charging the obtaining of money by color of a false token with intent to cheat or defraud. But the same difficulty will exist if this be attempted; for there is no allegation in the indictment from which it appears how the bank check referred to was a false token—that is, whether it was a forgery, or fraudulently drawn on a bank in which the drawer had no funds.

Let the indictment be quashed.

BROZNACK V. STATE.

109 Ga. 514—35 S. E. Rep. 123.

Decided January 25, 1900.

FALSE PRETENSES—ARGUMENT OF COUNSEL: *Variance as to whom the pretense was made—A false pretense made in the purchase of one lot of goods does not of itself extend to a subsequent purchase—Counsel's belief as to guilt not a legitimate feature of argument.*

1. An allegation in an accusation that a given representation was made to one member of a firm, with a view to procuring credit, is not supported by evidence showing that such a representation was made solely to another member of that firm.
2. A charge of cheating and swindling, alleged to have been committed by making false representations as to financial condition, thereby obtaining credit, is not sustained when it affirma-

tively appears that the goods sold on the faith of those representations were actually paid for. Such representations, not repeated or reaffirmed, do not, for purposes of the penal statute, apply to credit given at a subsequent period, unless the person to whom the credit was extended knew, or had reason to believe, that the latter credit was extended solely on the faith of the representations previously made.

5. It was improper for counsel representing the State to say, in his argument to the jury, that he would not appear in the case if he "did not believe the defendant to be as guilty as any man that was ever tried in the courthouse," and the court should not have approved of such argument as legitimate.

(Syllabus by the Court.)

Supreme Court of Georgia.

Error to the City Court of Atlanta; Hon. Andrew E. Calhoun, Judge.

Jacob Broznack, convicted of cheating and swindling, appeals. Reversed.

Mosley & Griffin, for the plaintiff in error.

James F. O'Neill, for the State.

COBB, J. Broznack was arraigned in the Criminal Court of Atlanta on an accusation charging him with cheating and swindling, and was convicted. He made a motion for a new trial, which was overruled, and he excepted.

1. The accusation charged that the accused made certain false representations as to his financial standing to T. J. Stovall, a member of the mercantile firm of W. W. Stovall & Bro., and that upon the faith of these representations credit was extended. The evidence introduced showed that representations of the character alleged in the accusation were made to W. W. Stovall, and there was no evidence showing that any of the representations were made to T. J. Stovall. Proof of representations made to W. W. Stovall did not support the allegation made in the accusation, and a verdict finding the accused guilty was contrary to law, and should have been set aside.

2. It appeared from the evidence that on October 6, 1897, the accused made certain representations as to his financial standing to a member of the firm of Stovall & Bro., and purchased from them a bill of goods amounting to \$60.35. On October 20th he made another purchase, and still other purchases on November 15th and December 1st. On November

15th he paid the amount of the first bill, and on December 1st the amount of the second. He therefore still owes for the purchases made on November 15th and December 1st. The only representations as to his financial standing which he ever made to the firm from which he made the purchases were those made on October 6th, and those were never reaffirmed by him. In the case of *Treadwell v. State*, 99 Ga. 779, 27 S. E. 785, it was held that statements made by a merchant to a mercantile agency to be used as a basis for obtaining credit, but which were not acted on by any one until some time after the same had been made, could not be the foundation for a prosecution for cheating and swindling, unless the person making such statements expressly reaffirmed the truth of the same, or at the time of obtaining credit knew, or had reason to believe, that he was obtaining credit on the faith of the representations made in the previous statements. Applying the above to the facts of the present case, there is no evidence to show that Broznack knew or had reason to believe that the credit obtained by him on November 15 and December 1, was extended solely on the faith of the representations made by him on October 6. For aught that appears, the sole purpose of those representations was to obtain the credit extended on that date, and it was not unreasonable for the accused to suppose that the subsequent credits were extended to him by reason of his prompt payment of the first two purchases.

3. One of the grounds of the motion for a new trial complains that error was committed by the judge in allowing counsel who had been employed to assist the Solicitor in the prosecution to make the following statement to the jury in his argument: "I would not appear in this case, if I did not believe the defendant to be as guilty as any man that was ever tried in the courthouse." The court not only declined to stop counsel, but expressly ruled that what is above quoted was "legitimate argument." We think this was error. Counsel "is never justified in expressing the opinion, however he may entertain it, that one whom he is pursuing is guilty. Such opinion is not legal evidence and in no circumstances, and at no step of the proceedings is he entitled to thrust it into the case, either by direct words or by implication." 1 Bish. New Cr. Proc. § 293, subd. 3. Upon this subject the same author says: "The opinion of counsel as to the guilt or innocence of the defendant should not, we have

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seen, be by them expressed to the jury. Within this principle, a prosecuting lawyer ought not to assure the jury of belief that he has made out a case against the defendant; for this is the exact question they, alone and unbiased, are to decide. Yet one may well argue, and he should, that the testimony has established his client's cause." 1 Bish. New Crim. Proc. § 975a (2). See also in this connection, Hopkin's Pen. Code, § 454, p. 115, citing 1 Bish. Crim. Proc. 311.

Judgment reversed. All the Justices concurring.

MALLETT v. STATE OF NORTH CAROLINA.

181 U. S. 589—45 Law. Ed. 1015—21 Sup. Ct. Rep 730.

Decided May 20, 1901.

FEDERAL QUESTIONS—EX POST FACTO LAWS: *Federal question raised on petition for re-hearing in State Court, and there considered in new opinion, properly presented—Matters raised in State Courts as State questions, not considered on error, as Federal questions—A valuable case as to ex post facto laws.*

1. If after opinion rendered by a State Court of last resort, a federal question is raised, by petition for re-hearing and is considered by that court, the question is in proper form to come up before the Supreme Court of the United States, by writ of error; but it would be otherwise, had the State Court refused to entertain such question as raised.
2. The State of North Carolina is divided into two criminal districts. At the time of the trial and conviction in one district, the State did not have the right of appeal. The defendant appealed to the Superior Court and obtained a reversal of the conviction; but in the meantime, the Legislature had declared the right of the State to appeal in that district, but not in the other. The State appealed to the Supreme Court and was sustained. *Held:*

1. Granting to the State a right of appeal did not impose on the defendant any other penalty than that previously enacted, or change the nature of the crimes, hence, the statute was not an *ex post facto* law.
2. The enactment granting an appeal in one district but not in the other, was not in violation of the provision of the United States Constitution, which insures equal protection to all citizens.

3. The fact that certain books, etc., taken from defendant by writ of attachment were used in evidence, being raised as a State question in the State Court, and not as a Federal question, was not in form to be reviewed upon writ of error.

Supreme Court of the United States.

Writ of error to the Supreme Court of North Carolina, to review a decision of that Court in a criminal case. *State v. Mallett*, 125 N. C. 718, 34 S. E. Rep. 651. Affirmed.

Statement made by Mr. JUSTICE SHIRAS:

In September, 1898, John P. Mallett and Charles B. McHeigan were indicted and tried in the Criminal Court of the County of Edgecombe, North Carolina, for conspiracy to defraud. They were convicted and sentenced to two years' imprisonment in the common jail. They appealed to the Superior Court. The record was certified up by the clerk of the Criminal Court on April 1, 1899. The Superior Court reversed the verdict and judgment, and granted a new trial. From this judgment of the Superior Court the State appealed, on July 7, 1899, to the Supreme Court, which reversed the judgment of the Superior Court, and remanded the cause to the Criminal Court, with directions that the sentence imposed by that court should be carried into execution.

At the time of the commission of the offense, and at the time of the trial in the Criminal Court of Edgecombe County, the State of North Carolina was not entitled to appeal to the Supreme Court of the State from the judgment of the Superior Court granting the defendants a new trial. There are two district criminal courts in the State—the Eastern and the Western. In the Eastern District, in which the County of Edgecombe is situated, the State, since March 6, 1899, by legislation of that date, is allowed to appeal to the Supreme Court from a judgment of the Superior Court granting a defendant a new trial, but such right of appeal is not allowed to the State from judgments of the Superior Court in cases on appeal from the Western District Criminal Court. It thus appears that the right of appeal from the Superior Court to the Supreme Court was conferred upon the State after the commission of the offense and the trial in the Criminal and before the Superior Court had granted a new trial.

From the judgment of the Supreme Court of the State a writ of error was allowed to this court.

F. H. Buskee and R. O. Burton, for plaintiffs in error.
J. C. L. Harris, B. G. Green, C. A. Cook and Attorney General *Walser* for defendant in error.

MR. JUSTICE SHIRAS delivered the opinion of the court:

Before considering the errors assigned by the plaintiffs in error to the judgment of the Supreme Court of North Carolina, it is proper that we should dispose of the motion made by the counsel for the State to dismiss the writ of error, on the alleged ground that the record does not disclose that any Federal questions was raised in either of the courts in which the case was heard, and that no such question was raised.

It is, of course, obvious that there was no opportunity for the defense to raise in the Criminal Court the question as to the validity, as against the defendants, of the legislation allowing an appeal to the Supreme Court, because that legislation was not enacted till after the trial had been concluded.

It would also seem that the question of the validity of that legislation, in its Federal aspect, was not raised or considered in the Superior Court. It is true that in that court error was alleged to the action of the Criminal Court in permitting evidence of certain statements in the books of the defendants, and which books had been seized by the sheriff under an attachment against the property of the defendants, to be used on the trial against the defendants and over their objection; and that contention was sustained by the Superior Court, and the new trial was granted for that and other reasons. But it does not appear that the Superior Court was formally called upon to consider any Federal question.

But we are of opinion that questions arising under the Constitution and laws of the United States were presented in the Supreme Court of the State, and were by that court considered and decided against the party invoking their protection.

It is true, as we learn from the first opinion filed by the Supreme Court, that such Federal questions were not considered by that court, or, at all events, were not treated as Federal questions, but as questions arising under State laws. But the record discloses that, after that opinion had been filed, but before it had been certified down, the defendants filed a petition for re-argument, and presented the Federal questions

on which they rely. The Supreme Court entertained the petition, and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss, numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for a rehearing in the Supreme Court of a State after that court has pronounced its final decision. *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 942, 15 Sup. Ct. Rep. 768; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322.

But those were cases in which the Supreme Court of the State refused the petition for a rehearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. *State v. Mallett*, 125 N. C. 718, 34 S. E. 651. Had that court declined to pass upon the Federal questions, and dismissed the petition without considering them, we certainly would not undertake to revise their action.

The first contention we encounter in the assignment of error is that, as the statute which provides for an appeal from the Superior Court to the Supreme Court in criminal cases was not passed until after the commission of the offense charged and the trial in the Criminal Court, it was, as against the plaintiff in error, *ex post facto* and in violation of Art. 1, § 10, of the Constitution of the United States.

The opinion of the Supreme Court stating the facts and disposing of this question is brief, and may be properly quoted:

"The next exception in the petition is that at the time of the commission of the offense the statute allowed no appeal to the State from the ruling of the Superior Court judge. But the defendants had no 'vested rights' in the remedies and methods of procedure in trials for crime. They cannot be said to have committed this crime relying upon the fact that there was no appeal given the State in such cases. If they had considered that matter they must have known that the State had as much power to amend § 1237 as it had to pass it, and they committed the crime subject to the probability that appeals in rulings upon matters of law would be given the State from these intermediate courts. At any rate, their complaint

is of errors in the trial court, and when they appealed to the Superior Court they did so by virtue of an act which provided that the rulings of that court upon their case could be reviewed, at the instance of the State, in a still higher court. The appeal was certified up to the Superior Court April 1, 1899, and on July 7, 1899, the appeal was taken to this court. The statute regulating appeals from the Eastern District Criminal Court (chapter 471, Laws 1899), was ratified March 6, 1899."

The subject has been several times considered by this court. The first case was that of *Calder v. Bull*, 3 Dall. 386, 1 L. ed. 648, where the important decision was made that the provision prohibiting *ex post facto* laws had no application to legislation concerning civil rights. But the opinion, delivered by Mr. Justice Chase, contains a classification of the criminal cases in which the provision is applicable:

"1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates the crime or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

In *Cummings v. Missouri*, 4. Wall. 277, 18 L. ed. 356, and *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366, a law which excluded a minister of the gospel from the exercise of his clerical functions, and a lawyer from practice in the courts, unless each would take an oath that they had not engaged in or encouraged armed hostilities against the Government of the United States, was held to be an *ex post facto* law, because it punished, in a manner not before prescribed by law, offenses committed before its passage, and because it instituted a new rule of evidence in aid of conviction.

In *Kring v. Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443, will be found an elaborate review of the history of the *ex post facto* clause of the Constitution, and of its construction by the Federal and the State courts. Kring was convicted of murder in the first degree, and the judgment of con-

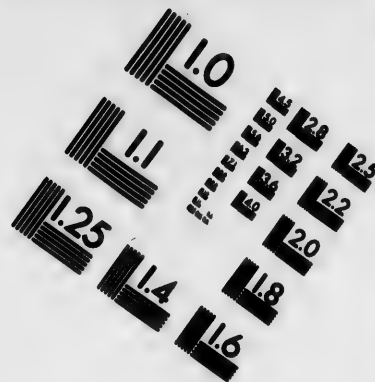
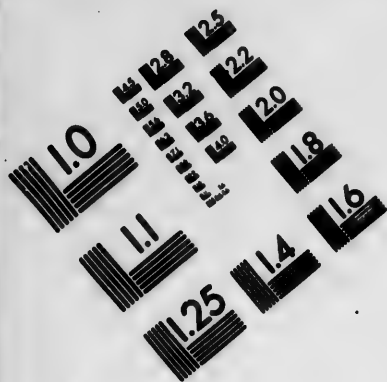
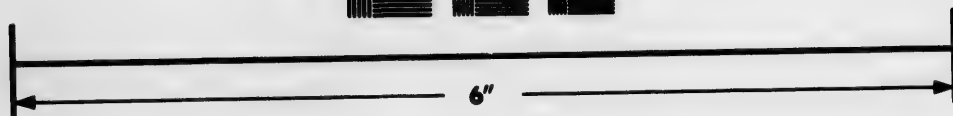
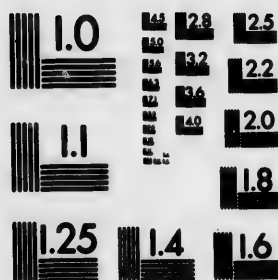


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demnation was affirmed by the Supreme Court of Missouri. A previous sentence pronounced on his plea of murder in the second degree, and subjecting him to an imprisonment for twenty-five years, had, on his appeal, been reversed and set aside. By the law of Missouri in force when the homicide was committed this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed, so that, by the force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime; and it was held, four of the justices dissenting, that, as to this case, the new law was an *ex post facto* law, and that he could not again be tried for murder in the first degree.

In *Hopt v. Utah*, 110 U. S. 574, 587, 28 L. ed. 262, 267, 4 Sup. Ct. Rep. 202, 209, one of the questions presented was whether a law which made it competent for witnesses to testify to the commission of a crime who were incompetent to so testify at the time the crime was so committed was an *ex post facto* law, and it was unanimously held otherwise. *Kring v. Missouri* was cited and relied on by the plaintiff in error, and was disposed of by the court, per Mr. Justice Harlan, in the following observations:

"That decision proceeded upon the ground that the State Constitution deprived the accused of a substantial right which the law gave him when the offense was committed", and therefore, in its application to that offense and its consequences, altered the situation of the party to his disadvantage. By the law as established when the offense was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree. * * * Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offense was committed.

"But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in

their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but, leaving untouched the nature of the crime and the amount or degree of proof essential to conviction, only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged."

In *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904, it was held that the Mississippi Code, in force when the indictment was found, did not affect in any degree the substantial rights of those who had committed crime prior to its going into effect; it did not make criminal and punishable any act that was innocent when committed, nor aggravate any crime previously committed, nor inflict a greater punishment than the law annexed to such crime at the time of its commission, nor alter the legal rules of evidence in order to convict the offender; that the inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime

charged was committed; that the mode of trial is always under legislative control, subject only to the condition that the Legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments.

In *Thompson v. Missouri*, 171 U. S. 380, 43 L. ed. 204, 18 Sup. Ct. Rep. 922, it was held that an act of the Legislature of Missouri, providing that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute, is not *ex post facto*, under the Constitution of the United States, when applied to prosecutions for crimes committed prior to its passage. In the opinion in this case the previous decisions were again reviewed, and the following passage from Cooley's Treatise on Constitutional Limitations was quoted with approval:

"So far as mere modes of procedure are concerned a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." Chap. 9, p. 272, 5th ed. See likewise *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

Applying the principles established by these cases to the facts of the present case, we think it may be concluded that the legislation of North Carolina in question did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evi-

dence, and require less or different evidence than the law required at the time of the commission of the offense; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offense charged.

It must not be overlooked that, when the plaintiffs in error perfected their appeal from the Criminal Court, by procuring its certification, on April 1, 1899, to the Superior Court, the new law, ratified on March 6, 1899, provided that the State could have the decision of that court reviewed by the Supreme Court.

Upon the whole, therefore, we agree with the Supreme Court of North Carolina in holding that the law granting the right of appeal to the State from the Superior to the Supreme Court of the State was not an *ex post facto* law within the meaning of the Constitution of the United States.

The further contention, that the plaintiffs in error were denied the equal protection of the laws because the State was allowed an appeal from the Superior Court of the Eastern, and not from the Western District of the State, is not well founded.

In *Missouri v. Lewis*, 101 U. S. 23, *sub nom. Bowman v. Lewis*, 25 L. ed. 989, it was held that, by the Fourteenth Amendment of the Constitution of the United States, a State is not prohibited from prescribing the jurisdiction of the several courts, either as to their territorial limits, or the subject-matter, amount, or finality of their respective judgments or decrees; and that where, by the Constitution and laws of Missouri, the St. Louis Court of Appeals has exclusive jurisdiction in certain cases of all appeals from the circuit courts in St. Louis and some adjoining counties, and the Supreme Court has jurisdiction of appeals in like cases from the circuit courts of the remaining counties of the State, such an adjustment of appellate jurisdiction is not forbidden by anything contained in the Fourteenth Amendment. It was said by Mr. Justice Bradley, giving the opinion of the court:

"Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not neces-

sity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto. * * * If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. One side of the line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceedings. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision."

The principles of this case have been approved and applied in several subsequent cases. *Hallinger v. Davis*, 146 U. S. 314, 322, 36 L. ed. 986, 990, 13 Sup. Ct. Rep. 105; *Hodgson v. Vermont*, 168 U. S. 272, 42 L. ed. 464, 18 Sup. Ct. Rep. 80; *Holden v. Hardy*, 169 U. S. 384, 42 L. ed. 788, 18 Sup. Ct. Rep. 383; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77.

We therefore see no error in the action of the Supreme Court of North Carolina in holding that the State has control of its own legislation as to the cases in which it will permit appeals in its own behalf in its courts.

There remains to consider the contention that, in the trial in the Criminal Court, by the use of certain books of account belonging to them, the plaintiffs in error were thereby made to be

witnesses against themselves, and thus their privileges and immunities as citizens of the United States have been abridged, and they are deprived of their liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

In the petition for a rehearing in the Supreme Court, which, as we have seen, is the only part of the record on which the plaintiffs in error can rely as raising Federal questions, the point was thus presented:

"That prior to the beginning of this action an attachment against the property of the defendants was issued at the instance of J. M. Baker, administrator of M. L. Woolard and of Solomon Woolard, who is the chief prosecuting witness in the case. By virtue of said attachment the sheriff of Edgecombe County seized the ledger and counter-book of the defendants and has kept possession of them up to this time. At the trial of the present indictment the said books so wrongfully taken from the defendants were offered in evidence. The defendants objected; the objection was overruled, and the defendants excepted. In this the defendants submit there was error. For it is, in effect, making the defendants give evidence against themselves under the principles laid down in the case of *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524. At the argument of this case at this term counsel had not found this authority, and their argument did not go upon this ground. Since said hearing they found said case, and they are advised that the principle and the authority are decisive, and would at once satisfy the court of the defendants' right to a new trial, if the matter could be brought to its attention."

The only ground of objection shown by the record to have been taken by defendants' counsel to the admission of this evidence was "because the testimony now offered was subsequent to the examination in the supplementary proceedings."

Nothing seems to have been claimed, either in the Criminal Court or in the Superior Court, as to the inadmissibility of the books as evidence on the ground of any provision of the Federal Constitution. The Supreme Court thus treated the subject:

"We will consider now the only exception which the petition to re-argue insists the judge of the Superior Court should have passed upon and held in favor of the defendants, *i. e.*, that

the sheriff, by attachment, having seized the ledger and counter-book of the defendants, they were put in evidence against them. There was certainly no error in using the defendants' own entries against them. The shoes of a party charged with crime can be taken and fitted to tracks as evidence, and in one case, when a party charged with crime was made to put his foot into the tracks, the fact that it fitted was held competent. *State v. Graham*, 74 N. C. 648, 21 Am. Rep. 493. Nor has it ever been suspected that if, upon a search warrant, stolen goods are found in the possession of the prisoner, that fact cannot be used against him. Here the books came legally into the possession of another, and the tell-tale entries were competent against the parties making them in the course of their business."

It therefore appears by the statement of the plaintiffs in error in their petition for a re-argument that no Federal question was raised or considered in the Criminal Court or in the Superior Court, in respect to the admission of the evidence, so that there was no basis on which to claim error in this respect in those courts. Nor did the Supreme Court, in passing upon the contention, deal with it as a Federal question, but as a mere question arising under the administration of the criminal law of the State, and there is, therefore, nothing in its action for us to review.

But we do not wish to be understood as implying that, even if this question had been duly presented in the State courts as a Federal question, there was error in admitting the evidence complained of.

The judgment of the Supreme Court of North Carolina is affirmed.

DREYER v. ILLINOIS.

187 U. S. 71—Sup. Ct. Rep.

Decided November 10, 1902.

FEDERAL QUESTIONS—JURY NOT IN CHARGE OF SWORN OFFICER—DISAGREEMENT OF JURY NO BAR TO SECOND TRIAL—ILLINOIS INDETERMINATE SENTENCE STATUTE: *Whether a State statute is in violation of a State Constitution, is not a Federal Question—Waiver by silence of error in a criminal trial—Review of the law in relation to disagreements of juries.*

1. The fact that a jury was not placed in the custody of a sworn officer, as required by a State statute, does not raise a Federal Question, especially so, when the accused did not conform to the local practice and enter his objection at the time.
2. The indeterminate statute of Illinois, vesting in certain non-judicial officers the power within certain limits to determine the length of imprisonment, is not in violation of the Fourteenth Amendment to the Constitution of the United States.
3. "Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State."
4. The question whether the Indeterminate Sentence Statute is, or is not, in violation of the Constitution of Illinois, is not necessarily a question to be passed upon by the Supreme Court of the United States.
5. While the power to discharge a jury in a criminal case because of its inability to agree, should be exercised with great caution, yet, when after taking all of the circumstances into consideration, it is manifest that the jury cannot agree, the court may discharge the jury; and, such discharge is not a bar to another trial.
6. The record shows that the jury had the case under consideration from four o'clock on one afternoon until half past nine o'clock in the forenoon of the next day, "and being unable to agree upon a verdict" was discharged. *Held*, no bar to a second trial.

Supreme Court of the United States.

Error to the Supreme Court of Illinois. Argued April 18, 1902. Affirmed.

Statement of the case by

MR. JUSTICE HARLAN: By an indictment returned in the Criminal Court of Cook County, Illinois, on the 4th day of February, 1899, the plaintiff in error Dreyer was charged with the offense of having failed to turn over to his successor in office, as treasurer of the West Chicago Park Commissioners, revenues, bonds, funds, warrants and personal property that came to his hands as such treasurer, of the value of \$316,013.40—said commissioners constituting a Board of Public Park Commissioners appointed by the Governor and confirmed by the Senate of Illinois, and as such having the supervision of the public parks and boulevards in the town of West Chicago and authority under the law to collect and disburse moneys, bonds, etc., for their maintenance.

The indictment was based on section 215 of the Criminal Code of Illinois, which is as follows:

"If any State, county, town, municipal or other officer or person, who now is or hereafter may be authorized by law to collect, receive, safely keep or disburse any money, revenue, bonds, mortgages, coupons, bank bills, notes, warrants or dues, or other funds or securities belonging to the State, or any county, township, incorporated city, town or village, or any State institution, or any canal, turnpike, railroad, school or college fund, or the fund of any public improvement that now is or may hereafter be authorized by law to be made, or any other fund now in being or that may hereafter be established by law for public purposes or belonging to any insurance or other company or person, required or authorized by law to be placed in the keeping of any such officer or person, shall fail or refuse to pay or deliver over the same when required by law, or demand is made by his successor in office or trust, or the officer or person to whom the same should be paid or delivered over, or his agent or attorney, authorized in writing, he shall be imprisoned in the penitentiary not less than one *nor more than ten years*: *Provided*, Such demand need not be made when, from the absence or fault of the offender, the same cannot conveniently be made: *And provided*, That no person shall be committed to the penitentiary under this section unless the money not paid over shall amount to one hundred dollars, or if it appear that such failure or refusal is occasioned by unavoidable loss or accident. Every person convicted under the

provisions of this section shall forever thereafter be ineligible and disqualified from holding any office of honor or profit in this State." Hurd's Revised Statutes, 1901, p. 630, § 215.

A trial was commenced on the 29th day of August, 1899, and a jury was empaneled and evidence heard. The jury not having agreed upon a verdict were discharged.

A second trial was begun on the 19th day of February, 1900. The defendant filed a plea of once in jeopardy, which in substance averred that it was not true, as recited in the order of court at the previous trial, that the jury were unable to agree upon a verdict; also, that the discharge of the jury was without the defendant's assent, was against his objections made at the time and was without any moral or physical necessity justifying such a course on the part of the trial court.

On motion of the State, the plea of former jeopardy was stricken from the files, the defendant at the time excepting to the action of the court.

There was a second trial, which resulted in the defendant being found "guilty of failure to pay over money to his successor in office, in manner and form as charged in the indictment," the jury stating in the verdict that the amount not paid over was \$316,000, and imposing the punishment of confinement in the penitentiary.

The defendant, upon written grounds filed, moved for a new trial, and also moved in arrest of judgment. Both motions were overruled, and it was ordered and adjudged that the defendant be sentenced to the penitentiary "for the crime of failure to pay over money to his successor in office, thereof he stands convicted."

The judgment of the trial court having been affirmed by the Supreme Court of Illinois, the case is here upon writ of error allowed by the Chief Justice of that court.

Mr. *Alfred S. Austrian*, for the plaintiff in error. (Mr. *T. A. Moran* and Mr. *Levy Mayer* with him on the brief.)

Mr. *H. J. Hamlin* Attorney General of the State of Illinois; Mr. *Charles S. Deneen* and Mr. *A. C. Barnes*, for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court:

It is contended that the judgment of the Supreme Court of

Illinois, affirming the judgment in the present case of the Criminal Court of Cook County, in that State, denied to the plaintiff in error certain rights secured to him by the Constitution of the United States, particularly by the clause of the Fourteenth Amendment forbidding a State to deprive any person of liberty without due process of law.

The defendant insists that three questions, involving rights secured by the Constitution of the United States, are presented by the assignments of error.

1. The first of those questions, as stated by his counsel, relates to the alleged "omission to swear the bailiffs in the manner prescribed by the common law and the statutes of the State of Illinois before the jury retired to consider of their verdict." This point will be first examined.

The Criminal Code of Illinois provides: "When the jury retire to consider of their verdict in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted), unless by leave of the court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court: *Provided*, In cases of misdemeanor only, if the Prosecutor for the People and the person on trial by himself or counsel, shall agree, which agreement shall be entered upon the minutes of the court, to dispense with the attendance of an officer upon the jury, or that the jury, when they have agreed upon their verdict, may write and seal the same, and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement, and receive any such verdict so delivered to the clerk as the lawful verdict of such jury." Hurd's Rev. Stat. Ill. 1901, p. 660, § 435.

Referring to this section the Supreme Court, in the present case, said that it was reversible error in a trial for a felony to allow the jury to retire for the purpose of considering their verdict without being placed in charge of a sworn officer as required by the statute—citing *McIntyre v. People*, 38 Illinois, 514, 518; *Lewis v. People*, 44 Illinois, 452, 454; *Sanders v. People*, 124 Illinois, 218, and *Farley v. People*, 138 Illinois, 97. In *Lewis v. People*, just cited, the court observed that the

provisions of the above section "show the great care and solicitude of the General Assembly to secure to every person a fair and impartial trial; and it is eminently proper, as in many cases the accused is imprisoned, and it is not in his power to protect his rights from being prejudiced by undue influences. It should ever be the care of courts of justice to guard human life and liberty against being sacrificed by public prejudice or excitement. The jury should be entirely free from all outside influences from the time they are empaneled until they return their verdict and it is accepted and they discharged; and the legislature have determined that the provisions of this statute are necessary to accomplish the object. It is a provision easily complied with, and one member of the court, at least, has never in practice seen it dispensed with, except in cases of misdemeanor. The provisions of the statute are clear, explicit and peremptory. We know of no power short of its repeal, to dispense with this requirement."

But the court further said: "The point of controversy in the present case is not, however, whether it is reversible error to fail to comply with the statute, but whether the question is properly raised upon this record. No objection or exception was taken by the defendant, at the time of the retirement of the jury, that the officers in charge of it were not sworn, but the question was raised by him for the first time on his motion for new trial, one of the grounds of that motion being 'that when the jury retired to consider of their verdict in said case no constable or other officer was sworn or affirmed to attend the jury, in manner and form as provided by the statute of the State of Illinois.' * * * Affidavits made by the bailiffs themselves, and by an assistant of the prosecuting attorney, who participated in the trial, tend to prove that the oath administered was in the statutory form; but these affidavits also show that the only oath administered to them was on the 21st day of February, immediately after the empaneling and swearing of the jury. It is shown by the bill of exceptions that the trial was not concluded and the jury finally sent out until February 28th, so that even by the proof made on behalf of the people the only oath taken by the bailiffs was some six days prior to their retirement with the jury, and prior to the introduction of evidence and the subsequent steps of the trial. This cannot be held to be a compliance with the requirement of the statute

that 'when the jury shall retire to consider of their verdict,' etc., 'a constable or other officer shall be sworn,' etc. To swear the bailiffs immediately upon the jury being sworn, and prior to the introduction of the evidence, the arguments of counsel and instructions of the court—six or seven days prior to the retirement of the jury to consider of their verdict—would be little less than farcical."

It was, however, held, that under the principles established by former decisions in Illinois, the requirement of the statute could be waived by the accused, and that his failure to object at the time that the officer having charge of the jury was not sworn when the jury retired was equivalent to a waiver of compliance with its provisions. And it was adjudged "that the question whether or not, upon the retirement of the jury to consider of its verdict, it was placed in charge of a constable, or other officer, sworn to attend it, as prescribed by statute, is not properly raised by the record (of this case) and therefore [is] not available as error in this court."

It thus appears that while the State court expressly recognized the rights of the accused under the statute it adjudged that he had not properly raised on the record the question raised for the first time on motion for a new trial as to non-compliance with its provisions. But manifestly this decision presents no question of a Federal nature. A ruling to the effect that the accused shall be deemed to have waived compliance with the statute if the record does not show that he objected at the time to the action of the court, was an adjudication simply of a question of criminal practice and local law, was not in derogation of the substantial right recognized by the statute, and did not impair the constitutional guaranty that no State shall deprive any person of liberty without due process of law. We cannot perceive that such a decision by the highest court of the State brings the case upon this point within the Fourteenth Amendment, even if it should be assumed that the due process of law prescribed by that Amendment required that a jury in a felony case should be placed in charge of an officer especially sworn at the time to attend and keep them together until they returned their verdict or were discharged.

We adjudge that in holding that the record did not sufficiently present for consideration the question now raised, the State court, even if it erred in its decision, did not infringe any

right secured to the defendant by the Constitution of the United States.

2. Another question which counsel for the defendant contends is raised by the assignments of error relates to the final judgment of the Criminal Court of Cook County. It was adjudged by the trial court that the defendant be taken to the penitentiary of the State, at Joliet, and delivered to its warden or keeper, who was required and commanded to "confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof, *until discharged by the State Board of Pardons, as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced.*"

The judgment was in conformity with a statute of Illinois, approved April 21, 1899, entitled "An act to revise the law in relation to the sentence and commitment of prisoners convicted of crime, and providing for a system of parole," etc. The statute is sometimes referred to as the Indeterminate Sentence Act of Illinois, and as its validity under the Constitution of the United States is assailed its provisions must be examined.

That statute provides that every male person over twenty years of age, and every female person over eighteen years of age, convicted of a felony or other crime punishable by imprisonment in the penitentiary, except treason, murder, rape and kidnaping, shall be sentenced to the penitentiary, the court imposing the sentence to fix its limit or duration, the term of such imprisonment not to be less than one year, nor exceeding the maximum term provided by law for the crime of which the prisoner was convicted, making allowance for good time, as provided by law. § 1.

It made the duty of each Board of Penitentiary Commissioners to adopt such rules concerning prisoners committed to their custody as would prevent them from returning to criminal courses, best secure their self-support, and accomplish their reformation. To that end it provided that whenever any prisoner was received into the penitentiary the warden should cause to be entered in a register the date of his admission, the name, nativity, nationality, with such other facts as could be ascertained, of parentage, education, occupation and early social influences as seemed to indicate the constitutional and acquired

defects and tendencies of the prisoner, and, based upon these, an estimate of his then present condition, and the best probable plan of treatment. And the physician of the penitentiary was required to carefully examine each prisoner when received and enter in a register the name, nationality or race, the weight, stature and family history of each prisoner, also statement of the condition of the heart, lungs and other leading organs, the rate of the pulse and respiration, and the measurement of the chest and abdomen, and any existing disease or deformity, or other disability, acquired or inherited. Upon the Warden's register was to be entered from time to time minutes of observed improvement or deterioration of character, and notes as to the method and treatment employed; also all alterations affecting the standing or situation of the prisoner, and any subsequent facts or personal history brought officially to his knowledge bearing upon the question of the parole or final release of the prisoner; and it was the duty of the Warden, or, in his absence, the Deputy Warden, of each penitentiary to attend each meeting of the Board of Pardons held at the penitentiary of which he was Warden, for the purpose of examining prisoners as to their fitness for parole. He shall advise with that Board concerning each case, and furnish it with his opinion, in writing, as to the fitness of each prisoner for parole whose case the Board considered. And it was made the duty of every public officer to whom inquiry was addressed by the clerk of the Board of Pardons, concerning any prisoner, to give the Board all information possessed or accessible to him which might throw light upon the question of the fitness of the prisoner to receive the benefits of parole. § 2.

It was made the duty of the judge before whom any prisoner was convicted, and also the State's Attorney, of the county in which he was convicted, to furnish the Board of Penitentiary Commissioners an official statement of the facts and circumstances constituting the crime whereof the prisoner was convicted, together with all other information accessible to them in regard to the career of the prisoner prior to the time of the committal of the crime of which he was convicted, relative to his habits, associates, disposition and reputation, and any other facts and circumstances tending to throw any light upon the question as to whether such prisoner was capable of again becoming a law-abiding citizen. § 3.

Other sections of the statute are as follows:

"4. The said Board of Pardons shall have power to establish rules and regulations under which prisoners in the penitentiary may be allowed to go upon parole outside of the penitentiary building and enclosure: *Provided*, That no prisoner shall be released from either penitentiary on parole until the State Board of Pardons, or the Warden of said penitentiary shall have made arrangements, or shall have satisfactory evidence that arrangements have been made, for his honorable and useful employment while upon parole in some suitable occupation, and also for a proper and suitable home, free from criminal influences, and without expense to the State: *And, provided further*, That all prisoners temporarily so released upon parole shall at all times, until the receipt of their final discharge, be considered in the legal custody of the Warden of the penitentiary from which they were paroled, and shall, during the said time, be considered as remaining under conviction for the crime of which they were convicted and sentenced and subject at any time to be taken back within the enclosure of said penitentiary; and full power to enforce such rules and regulations and to retake and reimprison any inmate so upon parole is hereby conferred upon the Warden of said penitentiary, whose order or writ, certified by the clerk of said penitentiary, with the seal of the institution attached, and directed to all sheriffs, coroners, constables, police officers, or to any particular person named in said order or writ, shall be sufficient warrant for the officer or other person named therein to authorize said officer or person to arrest and deliver to the Warden of said penitentiary the body of the conditionally released or paroled prisoner named in said writ, and it is hereby made the duty of all sheriffs, coroners, constables, police officers or other persons named therein to execute said order or writ the same as other criminal process. In case any prisoner so conditionally released or paroled shall flee beyond the limit of the State, he may be returned pursuant to the provisions of the law of this State relating to fugitives from justice. It shall be the duty of the Warden, immediately upon the return of any conditionally released or paroled prisoner, to make report of the same to the State Board of Pardons, giving the reasons for the return of said paroled prisoner: *Provided, further*, That the State Board of Pardons may, in its discretion, permit any prisoner to temporarily and conditionally depart

from such penitentiary on parole and go to some county in the State named and there remain within the limits of the county, and not to depart from the same without written authority from said Board, for such length of time as the Board may determine, and upon the further condition that such prisoner shall, during the time of his parole, be and continuously remain a law-abiding citizen, of industrious and temperate habits, and report to the sheriff of the county on the first day of each month, giving a particular account of his conduct during the month and it shall be the duty of such sheriff to investigate such report and ascertain what has been the habits and conduct of such prisoner during the time covered by such report, and to transmit such report upon blanks furnished him by the Warden of the penitentiary, to said Warden within five days after the receipt of such prisoner's report, adding to such report the sheriff's statement as to the truth of the report so made to him by the prisoner. It shall also be the duty of such sheriff to keep secret the fact that such prisoner is a paroled prisoner, and in no case divulge such fact to any person or persons so long as said prisoner obeys the terms and conditions of his parole.

"5. Upon the granting of a parole to any prisoner the Warden shall provide him with suitable clothing, ten dollars in money, which may be paid him in installments at the discretion of the Warden, and shall procure transportation for him to his place of employment or to the county seat of the county to which he is paroled.

"6. It shall be the duty of the Warden to keep in communication, as far as possible, with all prisoners who are on parole from the penitentiary of which he is the Warden, also with their employers, and when, in his opinion, any prisoner who has served not less than six months of his parole acceptably has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the Warden shall make a certificate to that effect to the State Board of Pardons; and whenever it shall be made to appear to the satisfaction of the State Board of Pardons, from the Warden's report or from other sources, that any prisoner has faithfully served the term of his parole, and the Board shall be of the opinion that such prisoner can safely be trusted to be at liberty and that his final release will not be incompatible with

the welfare of society, the State Board of Pardons shall have the power to cause to be entered of record in its office an order discharging such prisoner for, or on account of, his conviction, which said order, when approved by the Governor, shall operate as a complete discharge of such prisoner in the nature of a release or commutation of his sentence, to take effect immediately upon the delivery of a certified copy thereof to the prisoner, and the clerk of the court in which the prisoner was convicted shall, upon presentation of such certified copy, enter the judgment of such conviction satisfied and released pursuant to said order. It is hereby made the duty of the clerk of the Board of Pardons to send written notice of the fact to the Warden of the penitentiary of the proper district whenever any prisoner on parole is finally released by said Board." Laws of Ill. 1899, p. 142.

In this connection we are referred to article 3 of the Constitution of Illinois, dividing the powers of government into three distinct departments—legislative, executive, judicial—and providing that "no person, or collection of persons, being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted;" to section 1 of article 6 of the same Constitution, providing that "the judicial powers, except as in this article is otherwise provided, shall be vested in one Supreme Court, Circuit Courts, County Courts, justice of the peace, police magistrates and such courts as may be created by law in and for cities and incorporated towns;" and to section 13 of article 5, providing that the pardoning power shall be in the Governor of the State.

If we do not misapprehend the position of counsel, it is that the Indeterminate Sentence Act of 1899 is inconsistent with the above provisions of the State Constitution, in that it confers judicial powers upon a collection of persons who do not belong to the judicial department, and, in effect, invests them with the pardoning power committed by the Constitution to the Governor of the State.

We will not stop to consider whether the statute is in conflict with the provisions of the State Constitution to which reference is here made. We may, however, in passing observe that a similar statute, previously enacted, was upheld by the Supreme Court of Illinois. *George v. The People*, 167 Illinois, 447. It is only necessary now to say that even if the statute in question

were obnoxious to the objection now urged by plaintiff in error, it would not follow that this Court would review a judgment of the highest court of the State which expressly or by necessary implication sustained it as constitutional. A local statute investing a collection of persons not of the judicial department, with powers that are judicial and authorizing them to exercise the pardoning power which alone belongs to the Governor of the State, presents no question under the Constitution of the United States. The right to the due process of law prescribed by the Fourteenth Amendment would not be infringed by a local statute of that character. Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the Fourteenth Amendment has been respected by the State or its representatives when dealing with matters involving life or liberty. "When we speak," said Story, "of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely separate and distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The real meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution." Story's Const. (5th ed.) 393. Again: "Indeed, there is not a single Constitution of any State in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it." Story's Const. (5th ed.) 395.

The objection that the Act of 1899 confers upon executive or ministerial officers powers of a judicial nature does not, in our judgment, present any question under the due-process clause of the Fourteenth Amendment.

3. The remaining contention of the defendant is that,

under the circumstances disclosed by the record, the second trial of the case placed him twice in jeopardy, and therefore the judgment should be reversed.

Under date of September 1, 1899, the following order was made of record in the case: "This day come the said People, by Charles S. Denceen, State's Attorney, and the said defendant, as well in his own proper person as by his counsel, also comes; and also come the jurors of the jury aforesaid; and the aforesaid jury hearing the arguments of counsel and instructions of the court, retire in charge of sworn officers to consider of their verdict." And under date of September 2d, this order appears: "This day come the said People, by Charles S. Denceen, State's Attorney, and the defendant, as well in his own proper person as by his counsel, also comes. And also come the jurors of the jury aforesaid, being now returned into court, and, *being unable to agree upon a verdict, are thereupon by order of this court discharged from further consideration of this cause.*"

It seems to be undisputed that the case was submitted to the jury at four o'clock in the afternoon and that the jury having retired to consider of their verdict were kept together until nine o'clock and thirty minutes in the morning of the succeeding day, when they were finally discharged from any further consideration of the case.

The contention is that, notwithstanding the recital in the record that the jury were discharged by the court because they were unable to agree upon a verdict, such discharge was without moral or physical necessity and operated as an acquittal of the defendant.

Upon the face of the question under examination the inquiry might arise whether the due process of law required by the Fourteenth Amendment protects one accused of crime from being put twice in jeopardy of life or limb. In other words, is the right to be put twice in jeopardy of life or limb forbidden by the Fourteenth Amendment; or, so far as the Constitution of the United States is concerned, is it forbidden only by the Fifth Amendment, which prior to the adoption of the Fourteenth Amendment had been held as restricting only the power of the National Government and its agencies?

We pass this important question without any consideration of it upon its merits, and content ourselves with referring to

the decision of this Court in *United States v. Perez*, 9 Wheat. 579. That was a capital case—in which without the consent of the prisoner or of the Attorney of the United States, the jury being unable to agree were discharged by the court from giving any verdict—this Court, speaking by Mr. Justice Story, said: “We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American Courts; but, after weighing the question with due deliberation, we are of opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial.” If the due process of law required by the Fourteenth Amendment embraces the guarantee that no person shall be put twice in jeopardy of life and limb—upon which question we need not now express an opinion—what was said in *United States v. Perez* is applicable to this case upon the present writ of error and is adverse to the contention of the accused that he was put twice in jeopardy.

The principles settled in *United States v. Perez*, we may remark, were reaffirmed in *Ex parte Lange*, 18 Wall. 163, 175; *Simmons v. United States*, 142 U. S. 148; *Logan v. United States*, 144 U. S. 263; *Thompson v. United States*, 155 U. S. 271, 284.

The conclusion is, that the judgment of the Supreme Court of Illinois did not deny to the plaintiff in error any right secured by the Constitution of the United States, and is therefore Affirmed.

STATE v. DOW.

70 N. H. 286—47 Atl. Rep. 734.

Decided July 27, 1900.

FISH LAWS: *Statute of New Hampshire prohibiting certain kinds of fishing for commercial purposes, held to be constitutional.*

1. In New Hampshire, the power to enact game and fish laws was exercised previous to the Constitution, and having been long in beneficial operation, should not at this time be questioned.
2. Preserving fisheries is a clear legislative power; and the question as to the means to be employed is one to be settled by the Legislature.
3. It was within the powers of constitutional legislation to provide punishment for "any person who shall, for the whole or any part of the time, engage in the business or occupation of fishing on any of the streams or ponds of this State for the brook or speckled trout, or in the lakes thereof for lake trout, with intent to sell or trade fish so caught."

Supreme Court of New Hampshire.

Walter E. Dow was indicted for engaging in the business of fishing for lake trout with intent to sell the fish so caught. The case was submitted on an agreement, that a verdict for the State should be directed, if the statute is constitutional. Verdict for the State.

Frank M. Beckford, Solicitor, for the State.
Jewell, Owens & Veasey, for the defendant.

PEASLE, J. "The power to enact" 'fish and game' "laws was exercised previous to the adoption of the Constitution, and it has been so long used, and so beneficially for the public, that it ought not now to be called in question." *State v. Roberts*, 59 N. H. 256, 257. "The duty of preserving the fisheries of a State from extinction, by prohibiting exhaustive methods of

fishing, * * * is as clear as its power to secure to its citizens, as far as possible, a supply of any other wholesome food." *Lawton v. Steele*, 152 U. S. 133, 139 14 Sup. Ct. 499, 38 L. Ed. 385. "From the earliest traditions, the right to reduce animals *feræ naturæ* to possession has been subject to the control of the law-giving power." *Geer v. Connecticut*, 161 U. S. 519, 522, 16 Sup. Ct. 519; 40 L. Ed. 793. "The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds." *Phelps v. Racey*, 60 N. Y. 10, 14; *Lawton v. Steele*, 119 N. Y. 226, 234, 23 N. E. 878, 7 L. R. A. 134.

In the exercise of this power, the legislature regulates the time and method of taking fish or game, and prohibits the taking by one who has already taken a certain quantity. *State v. Chapel*, 64 Minn. 130, 66 N. W. 205, 32 L. R. A. 131. The authority to enact these limitations flows from the power to prohibit; and this rests upon the proposition that the individual has no vested right in fish and wild game not reduced to possession. *State v. Roberts*, 59 N. H. 484, 486.

In the present instance the legislature has enacted that "any person who shall, for the whole or any part of the time, engage in the business or occupation of fishing on any of the streams or ponds of this State for the brook or speckled trout, or in the lakes thereof for lake trout, with intent to sell or trade fish so caught," shall be punished. Laws 1899, c. 22. The defendant claims that this law is unconstitutional, assigning as one reason for his contention that the act operates to give the wealthy sportsmen more than their just and equal share of the fish. It is not apparent in what way the defendant is denied any right granted to others. If they may fish, so may he; and the prohibition of his fishing with intent to sell the fish to them equally enjoins them from fishing with intent to sell their fish to him. "The statute makes no discrimination. * * * Everybody is prohibited." True it is that the prohibition affects some more than others. "Such is necessarily the effect of all restrictive laws. * * * The equality of the Constitution is the equality of persons, and not of places—the equality of right, and not of enjoyment. A law that confers equal rights on all citizens of the State, or subjects them to equal burdens, and inflicts equal penalties on every person who violates it, is an

equal law." *State v. Griffin*, 69 N. H. 1, 29, 30, 39 Atl. 260, 41 L. R. A. 177.

It is further argued that the act is not calculated to promote the end sought, that it does not protect the fisheries of the State, and so, not being an exercise of the police power, is an unwarranted invasion of the private rights of individuals. This claim has no foundation in fact. The restraint of the acts of those who make a business of fishing must inevitably tend to decrease the number of fish caught, and whether this was a wise means by which to accomplish the legitimate end was a question for the Legislature. *State v. Marshall*, 64 N. H. 549, 15 Atl. 210, 1 L. R. A. 51; *State v. Griffin*, 69 N. H. 1, 39 Atl. 260, 41 L. R. A. 177; *Phelps v. Racey*, 60 N. Y. 10; *American Express Co. v. People*, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138; *Allen v. Wyckoff*, 48 N. J. Law, 90, 2 Atl. 659. "It is a matter of common knowledge that the rapid depletion of game * * * is caused by indiscriminate slaughter by 'pot hunters,' who kill it for the general market. The practical question which confronted the Legislature was how to prevent the undue depletion of such game from this cause. This could only be done by adopting some means that would, as far as possible, prevent the game from becoming a subject of commerce in the general market." *State v. Chapel*, 64 Minn. 130, 132, 66 N. W. 205, 32 L. R. A. 131.

The defendant cites no case to sustain his position; but in the dissenting opinions of Justices Field and Harlan in *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. ed. 793, it was reasoned that a restriction upon the sale of game lawfully killed was an unjustifiable interference with the right of property thereby acquired in the game, that upon the killing the property became absolute, and that a State could not enact that the right acquired should be a qualified one only. This reasoning is satisfactorily answered by that of the majority of the court, and by the reasoning of State courts in cases which have come before them.

"It being conceded that the State, under its general police power, may lawfully prohibit the killing of the game birds in question, it may, of course, control such killing, and the times and purposes thereof. It may lawfully enact that they may be killed and sold and held for sale only for domestic consumption. The State, in the exercise of its power, instead of pro-

hibiting the killing altogether, permits the person killing them to acquire only a qualified right in them." *State v. Geer*, 61 Conn. 144, 152, 22 Atl. 1012, 13 L. R. A. 804; *State v. Chapel*, 64 Minn. 130, 66 N. W. 205, 32 L. R. A. 131.

"The Legislature has never conferred an absolute property in quail upon the person who might kill the same. The killing of quail * * * was permitted, not for sale—not to go upon the market as an article of commerce—but for the mere use of the person who killed the birds. The person killing quail under this statute has but a qualified property in the birds after they are killed. He may consume them. If a trespasser should take them from him, he might maintain an appropriate action to regain the possession. But the law which authorized him to kill the quail has withheld the right to sell, or the right to ship for the purpose of sale, and when such person undertakes to ship for sale he is undertaking to assert a right not conferred by law. The act, therefore, does not destroy a right of property, because no such right exists." *American Express Co. v. People*, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138. "The question of individual enjoyment is one of public policy, and not of private right." *Geer v. Connecticut*, 161 U. S. 519, 16 Sup. Ct. 519, 40 L. Ed. 793.

"The cases cited abundantly establish the doctrine that it is competent for the Legislature, for the purpose of protecting game or fish, to absolutely prohibit the sale of fish or game caught within the limits of the State during a closed season, or during the entire year." *People v. O'Neil*, 110 Mich. 324, 68 N. W. 227, 33 L. R. A. 696. The statute in question is a valid exercise of the legislative power to enact equal laws for the protection of the public right of fishery. It imposes upon all persons alike "restrictions and limitations upon the time and manner of taking fish." *State v. Roberts*, 59 N. H. 256.

In accordance with the stipulation in the case, the order must be:

Verdict directed for the State.

All concurred.

EDGERTON v. STATE.

Texas, —70 S. W. Rep. 90.

Decided October 22, 1902.

FORGERY—INDICTMENT—VARIANCE.

1. An indictment for forgery alleging that the forged instrument "is to the tenor substantially as follows" is bad, in that the terms are contradictory.
2. In the indictment the word "labor" appears in the copy of the alleged forged instrument, while in the instrument itself the corresponding word appears to be "labobor," "labolos" or "labobos." This is held to be a fatal variance.

Court of Criminal Appeals of Texas.

Appeal from District Court, Potter County; Hon. H. H. Wallace, Judge.

W. Edgerton, convicted of forgery, appeals. Reversed.

L. C. Barrett and *J. S. Bailey*, for the appellant.*Robert A. John*, Assistant Attorney General, for the State.

HENDERSON, J. Appellant was convicted for uttering a forged instrument in writing, and his punishment assessed at confinement in the penitentiary for a term of two years. Appellant made a motion to quash the indictment on the ground that where the forged instrument was accessible it should be set out according to its tenor. Here the indictment alleges "that said false instrument is to the tenor substantially as follows, to-wit." We understand that tenor imports an exact copy, and requires the strictest proof. *Baker v. State*, 14 Tex. App. 332; *Roberts v. Same*, 2 Tex. App. 4. "Substantially" we understand to mean not an accurate or exact copy, but one which embodies or contains the substance of the instrument. These terms are antagonistic, and are tantamount to saying that the instrument set out in the indictment is a substantial copy of the one forged. It has been held that to allege "the instrument is in substance to the effect, as follows, to-wit," is bad. So we hold that to allege that the instrument set out is substantially an accurate copy is bad.

Appellant further contends that there is a variance between

the allegation and proof as to the instrument set out in the indictment. The indictment in the copy of the instrument contains the words "for labor." The record shows that the instrument which was introduced contained, instead of "labor," "labobor." In this connection the clerk has sent up, as a part of the record, the original instrument which was introduced in evidence. An inspection thereof shows that the word in the instrument may be spelled "labobor" or "labolos" or "labobos," but not "labor." In our opinion there was a variance, and the instrument should not have been introduced under the allegation in the indictment.

It is not necessary to discuss other matters presented, but for the defect in the indictment heretofore pointed out the judgment is reversed, and the prosecution ordered dismissed.

STATE V. LEO.

108 La. 496—32 So. Rep. 447.

Decided June 16, 1902. Re-hearing denied June 28, 1902.

FORGERY—INDICTMENT—STATUTE: *Extrinsic facts to be set out—Construction of Statutes.*

1. Where the alleged falsely altered instrument, with the uttering of which a party stands charged in an indictment, is not full and complete on its face, but requires the introduction of evidence of extrinsic facts to make it such, such extrinsic facts must be set out in the indictment.
- 2 It does not suffice, in a criminal statute, that its purpose should be manifest. To be effective, that purpose must find expression in its language as required by legal rules. Courts may be authorized sometimes to restrain the generality of the terms of a law so as to exclude from its operation exceptional cases, but not to enlarge the terms of a limited law.
(Syllabus by the Court.)

Supreme Court of Louisiana.

Appeal from Criminal District Court, Parish of Orleans;
Hon. Joshua G. Baker, Judge.

Joseph M. Leo, convicted of forgery, appeals. Reversed.

Defendant has appealed from a sentence to the penitentiary at hard labor for two years "for the crime of uttering and

publishing as true a false, altered, forged, and counterfeited bond." In the indictment upon which he was tried and convicted it was charged that he "feloniously did utter, tender, and publish as true certain false, altered and counterfeited bond, the tenor of which said bond is as follows, to-wit:

"I, the undersigned, agree to stand as Security for Jos. M. Leo to the amount of his contract twenty two hundred dollars \$2200.

Respectfully,

"[Signed]

THOS. J. CALLAGHAN."

"He, the said Leo, at the time he uttered, tendered, and published as true the said false, altered, and counterfeited bond, well knowing the same to be false, altered, and counterfeited, with the felonious intent to injure and defraud, contrary to the form of the statute of the State of Louisiana in such case made and provided, and against the peace and dignity of the same."

We find in the record the following demurrer: "Defendant, Jos. M. Leo, demurs to all and any evidence on the part of the State under the indictment in this case, and enters this general demurrer on the following grounds:

"1. That said indictment does not charge any offense under any statute of this State.

"2. The offering or forging or counterfeiting or falsely making or altering a bond, as well as the offense of publishing as true any such false, altered, forged, or counterfeited bond, feloniously knowing the same to be false, altered, forged, or counterfeited bond, with intent to injure and defraud any person or body politic, are common-law offenses, since the statute does not define what is forgery or counterfeiting.

"3. That, in charging said offenses against defendant, the indictment should have conformed with the practice at common law, with the modification, however, introduced by the statutes, to the effect that 'it shall be sufficient to describe such instruments by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac simile* thereof or otherwise describing the same or the value thereof.'

"4. That said indictment does not conform to the common-law practice, with subjoined amendment in several respects.

"5. That the indictment is defective in this: that it does

not describe the instrument [charged to be forged] by any name or designation whatever, but terms it in general as 'a bond,' without stating in the least what sort or species of a bond, so as to apprise the accused of the nature or class of instrument or bond which he is charged to have forged, or to have uttered, tendered, or published same.

"6. That the indictment is defective in this: that when it alleges the contents of said bond, by *videlicet*, it does not recite the whole instrument, but leaves out the contract mentioned in said bond, by which said Thomas J. Callaghan is said 'to stand as security for Jos. M. Leo to the amount of his contract, twenty-two hundred dollars.' That the nature of said contract, its species or kind, are not made apparent, by reason of the omission to state in said indictment any name or designation by which the said contract may be usually known, by omitting to give even the purport thereof, and without in any wise describing the same, or the value thereof.

"7. That said indictment is defective in this: that the only description or designation of the obnoxious instrument is that it is 'a bond,' generally, while under a *videlicet* the security part of the contract is singled out and copied in the indictment, without explaining or specifying what the contract is, in *extenso*, and without copying the said contract in the indictment. That the accused is not informed of the nature, kind, or species of the contract referred to in the excerpt inserted in said indictment, and accused is entitled to be apprised of the whole contract—principal as well as accessory.

"8. That said indictment is defective in this: that it does not substantially state in what consists the alleged forgery, counterfeiting, or alteration, and does not substantially point out what part thereof is forged, counterfeited, or altered, nor what part is genuine, nor does it aver the whole of the instrument aforesaid is forged, counterfeited, or altered.

"Therefore defendant prays that this demurrer be sustained, and that said act of indictment be quashed."

Defendant filed, also, a second demurrer to the indictment preferred against him. He averred:

"1. That the allegations thereof do not charge any offense known to the laws of Louisiana.

"2. That the allegations or charges are insufficient to char-

acterize any offense or crime denounced and punishable by the laws of Louisiana.

"3. That the allegation 'to injure and defraud' is too vague and is insufficient, there being no statement as to the party he injured and defrauded.

"Wherefore defendant prays that the said indictment be quashed, and the prosecution dismissed."

These demurrers were overruled, defendant reserving a bill of exceptions. The defendant was arraigned, and pleaded "Not guilty," and the case went to trial. Upon the trial the District Attorney offered in evidence the bond and contract referred to in the indictment, which evidence was objected to by the defendant. The court overruled the objections, and the evidence was admitted, defendant reserving bills of exception. The trial resulted in a verdict of guilty, with recommendations to the mercy of the court. Defendant moved for a new trial, which the court refused. He reserved a bill of exception to this ruling, and filed a motion in arrest of judgment, which being overruled, he, after sentence, appealed.

The first of the bills of exception referred to as having been reserved to the introduction of evidence recites that when one Mrs. C. McCroslin, a witness in behalf of the State, after being sworn, was testifying on behalf of the State, a certain written paper of specifications of contract between defendant and the said Mrs. McCroslin was handed to said witness for examination and identification, and, after having been examined by said witness, the State then offered the said written instrument of specifications in evidence; and counsel for the defendant now makes part of this bill of exceptions the said written instrument of specifications so offered at the time, to which offer in evidence of the same counsel for the defendant then and there objected on the grounds, among others:

First. That the "so-called bond" and written specifications not known at law nor in common parlance as a "bond" and the same do not fall under the operation of Louisiana Acts of 1894, No. 180, aforesaid (page 223), since in them there is no stipulation whatever by builder, contractor, or undertaker for the payment of workmen, mechanics, and laborers, nor furnishers of material and supplies.

Secondly. That the term "his contract," in the *videlicet* inserted in the act of indictment herein is a vague and loose

term, pointing to no kind, species, or nature of contract for which the said Thomas J. Callaghan assumed to stand as security; that it might apply to any sort or species of obligations whatever, as to date, contracting parties, and nature and purport of obligations, so that in that respect the instrument does not sufficiently put defendant on his guard, and indicate what evidence he had to meet.

But said objections, as also the four objections in bill of exceptions No. 2, here reiterated and made a part hereof, as well as the various allegations of defendant's demurrers overruled by the court, and made a part of the present bill of exceptions, were overruled by the court for the reasons stated at the time by the court. Counsel for defendant then and there excepted, and made the said written instrument of specifications a part of his objections, together with the testimony of Mrs. McCroslin, which counsel now also makes part of this bill of exceptions; and now the defendant tenders this, his bill of exceptions, for signature, and prays that the same be signed and made a part of this record.

The second bill recites that, when Mrs. McCroslin was testifying as a witness for the State, a certain written paper, which are specifications of a contract between the defendant and Mrs. McCroslin, was handed to the witness for examination and identification, and, after having been examined by the witness, the State then offered the said contract and specifications in evidence, to which evidence counsel objected on the grounds:

First—That the instrument sought to be offered, and which purported to be an agreement of specifications for a building to be erected by this defendant, was inadmissible in evidence, inasmuch as no reference had been made thereto, nor was there any allegation in the indictment to put this defendant sufficiently upon his guard, so as to know what evidence he had to meet.

Second—That the said instrument offered by the State was mere specifications, and was not a bond which was alleged to have been forged and counterfeited; that the said instrument and specifications were separate and distinct from the so-called bond made the subject-matter of the alleged uttering and publishing as true; and, furthermore, that the so-called bond, as

set out in the indictment, does not in any way refer to the specifications then sought to be offered in evidence.

Third—That the indictment herein charges the uttering and publishing as true of a certain false, forged, and counterfeited bond of twenty-two hundred dollars, without in any respect giving the name, appellation, species, or kind of obligation by which any alleged contract might be ascertained or be known; nor does the said indictment give, either literally or in any other way, any allegation by which this defendant could be apprised of the said specifications so intended to be offered by the State on the trial hereof.

Fourth—That if the document herein set out in the indictment is intended to be a bond to secure a contract, and for the security of workmen and furnishers of materials, then and in that case the said pretended bond as set out in the indictment is not in compliance with the act approved July 12, 1894, and known as Act No. 180 of 1894. But said objections so urged to the admission of the specifications herein were overruled by the court for the reasons stated by the court at the time, to which ruling of the court counsel for the defendant then and there excepted, and made the specifications a part of his objection, together with the testimony of Mrs. McCroslin, which counsel also makes part of this bill of exceptions; and now this defendant tenders this, his bill of exceptions, for signature, and prays that the same be signed and made part of the record herein. The evidence objected to, but introduced, was annexed and made part of the bills, as was also the testimony of Mrs. McCroslin, taken down by the stenographer.

The bill of exception to the refusal of the new trial recites that the motion for a new trial, which was annexed and made part of the bill, having come up for trial, after argument thereon the court, for oral reasons assigned, overruled the motion, to which ruling counsel for defendant excepted, and, with leave of the court, made the contract of specifications on file part of the bill.

The motion for a new trial was based upon the following assigned grounds:

First—Because the verdict herein rendered is clearly contrary to the law and the evidence.

Second—Because on the trial hereof the witnesses W. O'Brien, Joseph Woodhall, L. W. Shaw, and S. W. Leo, wit-

nesses on behalf of the defendant, testified, in substance, that they had worked on the building wherein this alleged bond is said to have been given, and that they had had conversations both with Mrs. McCroslin and her husband, Mr. McCroslin, and that they both had stated to the said witnesses whose names are herein given that they never required a bond from this defendant on the building which was then being put up.

Third—Because on the trial of this cause the State offered in evidence, over the defendant's objection, a certain instrument in writing, purporting to be an agreement of specifications for a building to be erected by this defendant; that, over defendant's objection, the said specifications, although no part of the alleged indictment, and having no reference thereto, were permitted to go to the jury; that by reason thereof this defendant was prejudiced by the admission of said testimony.

Fourth—That the said admitted instrument, termed 'Specifications,' was not mentioned nor set forth in said indictment, nor was there any way by which this defendant could be apprised of the intended offer of said instrument of specifications, and that the admission thereof was prejudicial to his rights.

Fifth—Because, if the alleged contract, which is made the basis of this indictment was intended to be a contract as provided for by Act. No. 180 of 1894, then and in that case the same is not drawn up, nor is it in compliance with the said act, and is null; that the said pretended bond has never been recorded in the mortgage office in compliance with the said act heretofore recited.

Sixth—That the said document offered in evidence, and described in the indictment as a 'bond,' is not known as such either in law or popular appellation, but is simply a stipulation of suretyship, vague and general in its terms, without setting forth with whom the contract was made, when made, by whom made, and what the species, kind, or nature or object of the obligation was; that, in order that the said surety stipulation should be valid, that the principal obligation of which this was a surety-ship should have been set forth, either by giving the name by which it is known in law, or by giving its purport, neither of which has been done herein.

Seventh—Act. No. 180 of 1894 determines and classifies as a bond only the contract of suretyship on building contracts which is required of contractors and builders to secure the pay-

ment of all the workmen, mechanics, and laborers, and all who furnish materials and supplies actually used in the building; that there is no law or statute which classifies or terms as bonds stipulations of suretyship which the contractor or builders makes and furnishes to secure the owner with whom it is made, nor is the surety stipulation made in favor of the owner himself.

Defendant moved an arrest of judgment on the grounds:

First—Because the said indictment herein does not set forth the violation of any penal statute of this State.

Second—Because the indictment fails to set out any one of the known obligations as set forth in the statute which can become the subject-matter of forgery.

Third—That the indictment sets out as follows: That the said defendant, Joseph M. Leo, did feloniously utter, tender, and publish as true a certain false, altered, and counterfeited bond, the tenor of which is as follows, to-wit.:

“I, the undersigned, agree to stand as security for Joseph M. Leo to the amount of his contract, twenty-two hundred dollars. Respectfully, [Signed] Thomas J. Callaghan.” That the said pretended bond as herein set out is not a bond in law, but is only an agreement, which has never been perfected into a bond. That, as the statute prescribes what species of documents shall become the subject-matter of forgery, forgery cannot be committed by making an instrument in any form, unless provided for by law, even though it be calculated to deceive most persons.

Fourth—Because, if the pretended bond as set forth and described in the said indictment is intended to be known as a bond relative to contracts for buildings, and the security of workmen and furnishers of material, then this defendant says that the said document does not comply with, nor is it in accordance with, Act. No. 180 of 1894. That said act determines and classifies as a bond only the contract of suretyship on building contracts which is required of contractors and builders to secure payment of workmen, mechanics, and laborers, and all who furnish materials and supplies actually used on the building, and that there is no law which classifies or terms as bonds the stipulation of suretyship which the contractors or builders may make to secure the owner with whom it made the building contract, nor does the act stipulate that the surety

stipulation shall be made in favor of the owner himself; that nowhere is the document as set forth in the indictment known in law as a bond, and it is therefore not the subject-matter, nor can it be the subject-matter, of the crime alleged against this defendant.

In view of the premises, defendant prayed that judgment herein be arrested, and for general relief.

Albert Voorhies and Henriques & Dunn, for the appellant.
Walter Guion, Attorney General, and *J. Ward Gurley*, District Attorney (*Lewis Guion* of Counsel), for the State.

NICHOLLS, C. J. (after stating the facts). Section 833 of the Revised Statutes, after declaring that whoever shall forge or counterfeit, or falsely make or alter, or shall procure to be falsely made, altered, forged, or counterfeited, or shall aid or assist in falsely making, altering, forging, or counterfeiting, certain instruments which were specially enumerated, proceeds as follows: "Or shall alter (utter?) or publish as true any such false, altered, forged or counterfeited record, certificate, or attestation, charter, deed, will, testament, *bond*, letter of attorney, policy of insurance, bill of exchange, promissory note, acceptance, indorsement, assignment, order, acquittance, discharge, or receipt, knowing the same to be false, altered, forged or counterfeited, with intent to injure or defraud any person or body politic or corporate, on conviction shall be imprisoned by imprisonment at hard labor for not less than two or more than fourteen years."

Section 1049 declares that "in any indictment for forging, uttering * * * any instrument it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac simile* thereof, or otherwise describing the same or the value thereof."

Defendant insists that the instrument averred to have been feloniously uttered is not on its face a bond; that it is not sufficiently described; that extrinsic parol evidence had to be called in and used in the trial in aid of the charge made against him, touching matters and things which should have been set out in the indictment, so that he should have known, as he was entitled to have known, under the Constitution

(Article 10), the nature and cause of the accusation against him. That the evidence introduced on the trial should not have been admitted, he not having been properly apprised by the indictment as to what evidence he would have to expect against him or be prepared to meet. That the word "bond," in a statute prohibiting the uttering of a false, altered, and counterfeited bond, means a bond binding upon some obligor, to some obligee, and requiring something to be done, which, if not done, can be compensated by action on the bond. 13 Am. & Eng. Enc. Law (2d ed.) page 1098, note; *State v. Briggs*, 34 Vt. 591.

That the Supreme Court of Louisiana had held that the offense denounced as forgery was a common-law offense, because the Louisiana statute had not defined the offense, but remitted its definition to the common-law jurisprudence. That therefore it is not sufficient for the indictment to follow the language of the statute. It must be made in distinct compliance with the common-law requirements, except so far as modified by Louisiana statutes. That the indictment should have shown every fact and circumstance constituting the offense, so that the accused could not be misled as to the charge he has to answer. That an indictment describing a specific offense by the use of general terms, without setting out also all the facts and circumstances connected therewith, if the facts alleged do not make out the offense charged, is defective. That it is not enough to charge that the defendant committed the crime of uttering a false and altered instrument, but it should be alleged how he had committed it. *State v. Flint*, 33 La. Ann. 1288; *State v. Stiles*, 5 La. Ann. 324; Whart. Cr. Pl. pars. 154-221.

That when the nature, sort, or effect of the instrument does not affirmatively appear on its face, the extrinsic matter to show this must be alleged. 2 Bish. New. Cr. Proc. par. 415; *Com. v. Hinds*, 101 Mass. 209-211; *State v. Miss. Wheeler*, 19 Minn. 100 (Gil. 70) et seq.; *Williams v. State*, 51 Ga. 535; 1 Amer. Crim. Rep. 227; *People v. Galloway*, 17 Wend. 543; *People v. Harrison*, 8 Barb. 560; *Cunningham v. People*, 4 Hun. 455-457; *State v. Murphy*, 46 La. Ann. 419-421, 14 South. 920.

The defendant was not charged with forging or with altering an instrument of any kind. He is charged with having

feloniously uttered, tendered, and published as true a certain writing, which is to a certain extent, at least, described in the indictment. It is therein designated as a bond. Who uttered it is immaterial. In the portion of the instrument inserted in the indictment, we find that a pen had been run through the word "Andrus" and the word "and," and that letters "Jos" and the "M" are interlined; that the word "their" has been erased, and the word "his" interlined. The instrument, *without the erasures and interlineations*, reads:

"I, the undersigned, agree to stand as security for Andrus and Leo to the amount of their contract, twenty-two hundred dollars (\$2,200). Respt., [signed] Thomas J. Callaghan."

While with the alterations and interlineations it reads:

"I, the undersigned, agree to stand as security for Jos. M. Leo to the amount of his contract, twenty-two hundred dollars (2,200). Respt., [signed] Thomas J. Callaghan."

So that Thomas J. Callaghan is made to appear as agreeing to stand as security for Jos. M. Leo to the amount of his contract, \$2,200, instead of agreeing to stand as security for Andrus and Leo to the amount of their contract, \$2,200. So much appears on the face of the indictment. It does not appear who altered it. It is declared that it had been falsely uttered. It is further declared in the indictment that the defendant uttered, tendered, and published as true this false and altered instrument, designated therein as a bond, well knowing when he did so that the same was false and altered, and that this was done with the felonious intent to injure and defraud.

The indictment shows that this instrumen' so altered was tendered (uttered) by Leo to some one, though neither the person to whom it was offered, nor the circumstances under which it was uttered and tendered, are set out. The State claims that it is apparent that it was uttered and tendered to some one with whom Leo had either already made a contract, or with whom he proposed to make one if he could. It contends that the altered instrument, in the condition in which it appears in the indictment, was well calculated to mislead, deceive, and defraud any person to whom it would be tendered falsely as an agreement on the part of Callaghan to stand as security for Leo on his contract; that the moment Leo feloniously uttered this false and altered instrument, with the

knowledge that it was such, and with the felonious intent of defrauding some person, he committed a crime, under section 833 of the Revised Statutes, no matter who the person might be to whom the instrument was presented; no matter what the character, terms, or amount of the contract might be; no matter whether a contract had, already been entered into, or merely proposed; and no matter whether the party to whom it was presented should have, in fact, been injured or defrauded or not; that the legal commission of the crime was one thing, and the detailed circumstances of the crime another thing; that all that the State was called upon to set out in the indictment and disclose to the accused was the nature and cause of the charge against him, so that he knew what it was, leaving to him to call for detailed specifications of the charge in a bill of particulars if he thought himself not fully advised in the premises.

An examination of section 833 of the Revised Statutes will show that the instruments, under the terms of the section, which it is made a crime to *utter or publish as true*, if false, altered, or forged, or counterfeited, are for some reason made smaller than those which in the first portion of the section it is made a crime to falsely make, alter, forge, or counterfeit; that in this larger enumeration "securities for money or property" and "bonds" are both set out, while in the smaller one "securities for money or property" are left out, but "bonds" are retained. The District Attorney, with the statute before him, evidently felt it necessary to set out in the indictment the instrument which was to be averred as having been feloniously uttered in a manner such as to make it fall by designation under some one of the instruments included in the enumeration of the statute, and for that reason he selected the term "bond." The object of the General Assembly in enacting section 833 is very evident, but it does not suffice in a statute (particularly in a criminal statute) that its purpose should be manifest. To be effective, the purpose must find expression in the language of the law itself, as required by legal rules. We have held it permissible sometimes to restrain the generality of the terms of a law so as to exclude from its operation exceptional cases, but we are not authorized to eke out or enlarge the terms of a limited law so as to place thereunder cases which evidently should have been included therein to

fully effectuate their object, but which by inadvertence or other causes were omitted. We do not think it necessary for the purposes of this case to give a definition to the word "bond." This particular statute deals with "bonds" as things other and distinct from "securities for money or property," and we should do so also. The term bond is sometimes used as a generic term—as a written instrument by which a person has become bound or committed legally; as, speaking of an honest man, we hear it frequently said, "His word is as good as his bond," without reference to the specific form of the evidence of the obligation. Usually the word is taken to mean a secondary or accessory securing a primary obligation in favor of some third person. The indictment does not declare that the defendant, Leo, had come under any civil obligation, written or verbal, towards any one for which Callaghan had become his surety; that Leo had not in fact made any contract, or that he had tendered it to any one with the view of effecting a contract. The instrument declares: "I agree to stand security for Joseph M. Leo to the amount of his contract, twenty-two hundred dollars. Thomas J. Callaghan." Armed with it, Leo would doubtless have been in a position to induce some one to enter into a contract with him to an amount of \$2,200. The instrument would, under such circumstances, notwithstanding its terms of present obligation on the part of Callaghan, be, at most, an offer or tender by him to become security for Leo on a contract to the extent of \$2,200. The instrument would not, on its face, nor in reality, be a bond. If Leo should become liable upon a future contract, it might be said that coupling the obligation of Callaghan, that evidenced by this instrument, with his own, he had furnished a bond in favor of the obligor in the contract; but, until this obligation of Leo had arisen, this instrument, said to be Callaghan's, was merely inchoate, prospective. It was not on its face a bond. Other facts would have to arise and be connected with it to make it constitute part of a bond. It is true that as great a wrong and injury might be accomplished through the instrumentality of a writing of this kind as might be accomplished by the uttering of an instrument technically and strictly falling under the designation of a bond; but we cannot, in matters of crime, pass from one act falling within a statute to one falling without it, no matter how alike they

might be in the harmful consequences which the statute seeks to prevent. We do not think the altered instrument was technically a bond. Assuming that the facts connected with the uttering of this instrument were such as to have brought the defendant within the grasp of the provisions of the statute, these facts should have been set out in the indictment.

In *State v. Murphy*, 46 La. Ann. 420, 14 South 920, we quoted approvingly the following language from Wharton (page 740):

"Where an instrument is incomplete on its face, so that, as it stands, it cannot be the basis of any legal liability, then, to make it the technical subject of forgery, the indictment must aver such facts as will invest the instrument with legal force. Thus, where an indictment charged that A did feloniously and fraudulently forge a certain writing, as follows: 'Mr. Bostick: Charge A's account to us. B & C'—with intent to defraud B & C, it was held that the indictment was not valid without charging that A was indebted to Bostick, as there could be no fraud unless a debt existed."

Referring to the case before us at that time, we said:

"The indebtedness may be proved *aliunde*. To admit the proof and give legal force to the indictment, it must aver such facts as will invest the instrument with legal efficacy. Where an instrument is not on its face sufficiently full to be a receipt, the defect may be supplied by showing a course of dealing between the parties in which it is understood to be and treated as such. This extrinsic matter must appear both by averment and proof. * * * Assuming the discussion that the account judged is genuine, it is not *per se* of legal efficacy against any one without additional averments in the indictment setting forth the facts connected with the transaction." See, on this subject, *State v. Stephens*, 45 La. Ann. 702, 12 South. 883.

The indictment in the present case is for the same reason faulty, and the testimony offered in support of it, and which was admitted over defendant's objection, should have been excluded.

For the reasons herein assigned, it is hereby ordered, adjudged, and decreed that the verdict of the jury and the judgment of the court therein rendered, and herein appealed

from, be, and the same are hereby, set aside, annulled, avoided, and reversed.

Rehearing refused.

STATE V. BROWN.

110 La. 591—34 So. Rep. 698.

Decided May 11, 1903.

FORMER ADJUDICATION—AUTREFOIS ACQUIT—PERJURY: *An acquittal on a fatally defective indictment for perjury, no bar to another indictment for the same matter.*

1. The defendant was charged with having sworn feloniously, wilfully, falsely, and corruptly in a civil suit in which he testified as a witness. Upon his trial on the charge he objected to testimony offered to prove that he was aware at the time that the matter to the truth of which he had sworn was false. The trial court excluded the testimony at instance of defendant on the ground that the defendant was not charged with having testified, as before stated, knowing that his testimony was false. The ruling of the trial court is correct. Scilicet enters into the definition of perjury, and should be expressly charged. The indictment should not leave it to be implied that defendant knew that he was swearing to a false fact at the time he testified.
2. In thus holding the court does not wish it to be inferred that the interpretation of the statute requiring that it shall be sufficient to set forth the substance of the offense charged is in any respect changed. The court only holds that there should be a proper averment to falsify the matter wherein the perjury is assigned, and setting forth specifically that the fact sworn to is false. The indictment, because it did not include an allegation of knowledge, is fatally defective.
3. After a person has once been put on his trial before a court of competent jurisdiction upon an indictment which is sufficient to sustain a conviction, and the jury has been charged with his deliverance, he is in jeopardy. Here the indictment was not sufficient to sustain a conviction, and therefore defendant was not legally acquitted. The verdict does not sustain the plea of *autrefois acquit*.

PROVOSTY, J., dissenting.
(Syllabus by the Court.)

Supreme Court of Louisiana.

Appeal from Third Judicial District Court, Parish of Bienville; Hon. Benjamin P. Edwards, Judge.

E. Brown, informed against for perjury. He pleaded *autrefois acquit*. Plea sustained. State appeals. Reversed.

Walter Guion, Attorney General, and John C. Theus, District Attorney, (Lewis Guion, of counsel) for the State.

Joseph Rush Wimberly, for the appellee.

BREAUX, J. The State appeals from a judgment sustaining the plea of *autrefois acquit* interposed by the defendant.

Originally the defendant was indicted for perjury.

The indictment charged him with having feloniously, willfully, and corruptly committed perjury after having been duly sworn by F. L. Mayfield, deputy clerk of the District Court of said parish and State, on trial of the case in the District Court of said parish and State in No. 1,999, entitled "E. Brown v. D. E. Brown, Jr.," by feloniously, willfully, falsely, and corruptly testifying and swearing, after having been sworn as aforesaid, in substance, "that he, the said E. Brown, did not, on the day D. E. Brown, Jr., defendant in said cause, struck him, to-wit, in December, 1900, go into the house of Mrs. White or Mrs. Lizzie White."

The gravamen of the indictment contains further and necessary allegations to complete the bill, except in one particular.

It does not contain the averment that he well knew that his testimony was untrue.

The case in which the asserted false swearing was done was called and the trial proceeded with. A jury was impaneled, and evidence of the State begun, which evidence was met by an objection of counsel for defendant, based upon the deficiency of the indictment on the ground just stated; i. e., that the indictment did not show scienter of accused, or falsify the testimony.

The trial judge sustained the objection, and refused to admit evidence of the State to show the falsity of the testimony of the accused in the case before mentioned, in which it was charged he had perjured himself, on the ground, the trial judge held, that there was no particular averment to contradict the matter sworn to by defendant. After the judge had

thus ruled, the plaintiff moved for a discontinuance of the case, which motion was overruled.

The case was submitted to the jury, and a verdict of not guilty was returned.

The District Attorney shortly afterward presented a bill of information against the accused, charging him with the same crime. This information contained the words, which are not included in the indictment before mentioned, "And at the time well knowing same to be false," nor their equivalent. In every other respect the crime was charged as it had been charged in the indictment before referred to. In due time after the bill of information had been filed, the accused pleaded *autrefois acquit* and former jeopardy, basing his plea on the verdict found by the jury on the indictment in question, the first referred to above.

The plea was sustained by the District Court, holding, as stated, and as shown by the bill of exceptions before us, that the original bill of indictment was absolutely null; that it could have been amended; that the jury had been impaneled and sworn; and that the State commenced its evidence, and had proceeded some time, when the District Attorney offered to discontinue the prosecution, which the court would not, at that stage of the trial, permit; and the jury found the verdict of not guilty before mentioned.

Whilst it is true that good pleading would require that an allegation in indictment, such as that which was not included in the indictment in the case in which the defendant was found not guilty, it is always absolutely necessary, as a general rule in every case, to set forth that the defendant was well aware of the fact that his testimony was not true.

Proceedings in the case of perjury have been simplified by statute. It still remains necessary to aver in the indictment the substance of the offense charged, or by what court or before whom the oath was taken, together with a proper averment to falsify the matter wherein the perjury is assigned. Rev. St. 858.

Here the indictment was defective in that it did not, as required, falsify the matter wherein the perjury was assigned. It did not allege that the defendant knew said statement to be false, or that he was ignorant whether or not said statement was true. This was a matter of substance, and in that respect the

indictment was informal. Where knowledge is an ingredient of the offense, it must be alleged.

The position of defendant does not find unqualified support in McClain on Criminal Law, vol. 2, p. 882, to which he invites our attention. In one sentence the commentator says that the indictment must also show knowledge on the part of the accused of the falsity of the statement at the time it was made, and that it is not sufficient merely to negative the truth of the statement. In the sentence following it is laid down that "knowingly false" may be inferred from the fact that the court charges that it was willfully false.

In the note the commentator, in support of the first proposition, refers to *State v. Morse*, 1 G. Greene, 503, in which the court held: "The omission in the indictment to charge in the language of the statute that the defendant deposed, affirmed, or declared some matter to be a fact knowing the same to be false, is a substantial defect, and is not cured by any statute."

From that point of view it follows that the word "falsely," as pleaded, is not an equivalent to scienter on the part of the defendant. It does not show that the defendant swore to a fact knowing it to be false.

"Negation of false matter should be express." Wharton, Crim. Ev. § 1300.

Without the expressed negation, there is no negation of false matter at all in the indictment. Not only must it be alleged that the defendant swore "falsely" or "corruptly," but it must also be alleged that he knew that he swore falsely. A person may swear falsely or corruptly, although the fact to what he swears may, in its bearing, be the truth.

To sustain the second proposition, the commentator in his note cites one case in which the verdict was drawn under a special statute of the State of Minnesota, not requiring, as we take it, as in Louisiana, the negation of a false matter to be express.

Well-considered decisions hold that knowledge must be alleged in order that a valid indictment may be written when an indictment is found under a law which requires that a proper averment be made "to falsify the matter wherein the perjury is assigned," to quote from the Louisiana statute.

Having arrived at the conclusion that "knowledge" must be

alleged to the extent required by the statute, we are next led to inquire into the effect of the verdict rendered.

We think that the indictment was not only defective, but that it was fatally defective.

From that point of view it follows that the verdict could not form the basis of *autrefois acquit*. No decision can be found to the contrary, and no commentator has expressed himself to the contrary. The test is, was the indictment fatally defective? If it was, the verdict is equally as null. *State v. Meekins*, 41 La. Ann. 543, 6 South. 822.

The law and the evidence being in favor of the State, it is ordered, adjudged, and decreed that the judgment appealed from is voided, annulled, and set aside; the bill of information is reinstated; also the case, in order that it may be proceeded with in manner and form required.

The case is therefore remanded to be tried.

PROVOSTY, J., dissents.

PAT v. STATE.

116 Ga. 92—42 S. E. Rep. 339.

Decided August 7, 1902.

FORMER ADJUDICATION—RECEIVING STOLEN GOODS: *Acquittal of burglary is no bar to an indictment for receiving stolen goods—To constitute the crime of receiving stolen goods, the receiving and the knowledge that they were stolen must be concurrent.*

1. An acquittal upon an indictment for burglary will not support a plea of *autrefois acquit* to an indictment for receiving stolen goods, knowing the same to have been stolen.
2. A charge of this nature cannot be established by evidence showing that the accused received the stolen goods, not knowing at the time that they had been stolen, but, upon being informed of the larceny, secreted the goods, and retained the possession thereof. (Syllabus by the Court.)

Supreme Court of Louisiana.

Error to Superior Court, Elbert County; Hon. H. M. Holden, Judge.

Fannie Pat, convicted of receiving stolen goods, brings error. Reversed.

I. C. Van Duzer and Geo. C. Grogan, for the plaintiff in error.

David W. Meadow, Solicitor General, for the State.

FISH, J. Fannie Pat was indicted for the offense of receiving stolen goods, knowing them to be stolen. Upon the trial she pleaded *autrefois acquit*, in that she had, at a former term of the court, been tried and acquitted of the offense of burglary, and that the facts in the burglary case were the same as those in the case upon trial; the two cases involving the same transaction. The plea was overruled, and upon the trial the accused was found guilty. She made a motion for a new trial, which was denied, whereupon she excepted to the judgment refusing the new trial, and also to the overruling of the plea of *autrefois acquit*.

1. The offense of receiving stolen goods, knowing them to be stolen, is not a necessary element in, and does not constitute an essential part of, the offense of burglary. The two offenses are separate and distinct, and a verdict of guilty of receiving stolen goods, knowing them to be stolen, could not legally be found under an indictment for burglary. *Mangham v. State*, 87 Ga. 549, 13 S. E. 558. Therefore, the acquittal of the accused upon the indictment for burglary could not support a plea of *autrefois acquit* to the indictment for receiving stolen goods, knowing them to be stolen. See *Bell v. State*, 103 Ga. 397, 30 S. E. 294, 68 Am. St. Rep. 102; *Smith v. State*, 105 Ga. 724, 32 S. E. 127.

2. Complaint was made of a charge of the court to the effect that if the accused did not know that the goods were stolen at the time she received them, but knew after she received them that they were stolen, and then secreted them, the jury would be authorized to convict her. We think this charge was erroneous. The gist of the offense of receiving stolen goods, knowing them to be stolen, is the felonious knowledge that the goods were stolen; and to constitute the offense, the person receiving the goods must have this knowledge at the time of receiving them. *State v. Caveness*, 78 N. C. 484; *May v. People*, 60 Ill. 119.

Judgment reversed.

All the justices concurring, except LEWIS, J., absent on account of sickness.

McINTOSH V. STATE.

116 Ga. 543—42 S. E. Rep. 793.

Decided November 12, 1902.

THE COURT ADJUDICATION: *Same transaction and charged under the same statute; but not as the same offense.*

1. An acquittal under an indictment charging the accused with the offense of using obscene and vulgar language in the presence of a female will not operate to bar a prosecution for using opprobrious words and abusive language to and of another, even though both indictments related to the same act.
(Syllabus by the Court.)

Supreme Court of Georgia.

Error to Superior Court, Chatham County; Hon. Pope Barrow, Judge.

Nick McIntosh, convicted of using abusive language, brings error. Affirmed.

W. F. Slater, for the plaintiff in error.

W. W. Osborne, Solicitor General, for the State.

COBB, J. The accused was placed on trial upon an indictment charging him with using opprobrious words and abusive language to and of one C. S. Waters on the 31st of April, 1902. He filed a special plea of former jeopardy. There was a finding against him on this plea. He then pleaded not guilty, and there was also a finding against him on this plea. The case is here upon a bill of exceptions assigning error upon the judgment overruling a motion for a new trial. While the record contains several assignments of error upon rulings made during the trial, the only assignments of error insisted on in the brief of counsel are those which complain of the finding against his special plea of former jeopardy.

It appears that, prior to his arraignment on the indictment in the present case, the accused had been tried in the City Court of Savannah upon an accusation charging him with having on the 31st day of April, 1902, used obscene and vulgar language in the presence of females on a street car, and that the trial on this accusation resulted in an acquittal. It ap-

pears from the evidence introduced on the trial of the issue framed upon the special plea that C. S. Waters was the conductor of a street car, and that the accused had used to him opprobrious words and abusive language while on the car; that he then left the car, and, when on the ground, again used language of a similar nature; that what occurred on the car and on the ground constituted one continuous transaction, lasting about two minutes; and that the occurrence in which the opprobrious words were used was under investigation in the trial in the City Court. It is to be determined whether, under this state of facts, the acquittal in the City Court operates as a bar to a prosecution under the present indictment. An indictment for using obscene and vulgar language in the presence of females does not charge the same offense as an indictment which charges one with having used opprobrious words and abusive language, tending to cause a breach of the peace. The offenses are separate and distinct. While both offenses are made penal by the same section of the Code (Pen. Code, § 396), they are no less separate and distinct offenses. A person may in one transaction so conduct himself as to be guilty of both these crimes. If one uses to and of another opprobrious words and abusive language which is obscene and vulgar, and this is done in the presence of a female, both offenses are committed, though there is only one transaction. In such a case the rule in *Blair's Case*, 81 Ga. 629, 7 S. E. 855, is to be followed. It is there said that if the evidence required to convict under the first indictment would not be sufficient to convict under the second, without proof of an additional fact which was necessary to constitute the offense, former jeopardy could not be pleaded in bar of the second indictment. See, also, *Smith v. State*, 105 Ga. 724, 32 S. E. 127; *Copenhagen v. State*, 15 Ga. 264. One who uses vulgar and obscene language in the presence of a female is guilty of a violation of law, whether that language is used to or of another or not. To constitute the offense of using opprobrious words and abusive language, even where the language used is also obscene and vulgar, it is essential to a conviction that the language must be used to and of another, and in his presence. A conviction could have been had under the accusation in the City Court upon evidence which would not have authorized a conviction under the indictment in the Superior Court.

That part of the transaction which could have been properly investigated under the accusation was not necessarily involved in the investigation under the indictment. In that trial it was wholly immaterial whether the language was obscene and vulgar, or whether it was used in the presence of a female. The finding against the plea of former acquittal was proper. See, in this connection, *Gully v. State*, 116 Ga. 527, 42 S. E. 790.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

GULLY V. STATE.

116 Ga. 527—42 S. E. Rep. 790.

Decided November 12, 1902.

FORMER ADJUDICATION—BIGAMY: *Acquittal on an indictment for bigamy with "Gussie Shingler," no bar to subsequent indictment charging bigamy with "Bessie Shingler"*—Practice—General objection not good against testimony, part of which is admissible.

1. An acquittal under an indictment charging that the accused committed bigamy by contracting an unlawful marriage with "Gussie Shingler" will not be a bar to a prosecution subsequently instituted under an indictment charging that, on the same date as that named in the first indictment, the accused committed bigamy by contracting an unlawful marriage with "Bessie Shingler," especially when it appears that, at the time upon which the marriages were alleged to have taken place, there were in life persons answering to the names both of Gussie and Bessie Shingler. The above is true, notwithstanding it appears that the witness who testified before the grand jury by mistake gave the name of Gussie Shingler when he intended to give that of Bessie, and that the name of Gussie was inserted in the indictment under a misapprehension growing out of this mistake of the witness; there having been but one marriage, and it having been in fact contracted with Bessie, and not Gussie.
2. Where objection is made to specified evidence as a whole, part of which is admissible and part inadmissible, and the objection does not point out the objectionable portion, there is no error in admitting the entire evidence.

(Syllabus by the Court.)

Supreme Court of Georgia.

Error to Superior Court, Decatur County; Hon. W. N. Spence, Judge.

R. C. Gully, alias C. R. Bridges, convicted of bigamy, brings error. Affirmed.

W. D. Sheffield, by *J. D. Harrison*, for plaintiff in error.

W. E. Wooten, *Solicitor General*, by *R. R. Arnold* and *Donaldson & Fleming*, for the State.

COBB, J.—R. C. Gully, sometimes known as C. R. Bridges, was placed upon trial, charged with the offense of bigamy; the indictment charging that on November 7, 1901, the accused married one Bessie Shingler; his lawful wife, Annie Bridges, being then in life, which fact was known to him. The accused filed a special plea setting up that at a previous term an indictment had been preferred against him charging him with the offense of bigamy, in that on November 7, 1901, he had married one Gussie Shingler—his lawful wife, Annie Bridges, being then in life, which fact was known to him; that he was arraigned on this indictment, and pleaded "Not guilty;" and that the trial resulted in a verdict of acquittal; a copy of the proceedings being attached to the plea. It was alleged that the offense charged in the indictment in the present case is the same as that charged in the indictment upon which the accused was previously indicted; that the present indictment charges identically the same and only the offense charged in the former indictment; that, in order to convict upon the present charge, it would be necessary to introduce the same evidence, without any additional facts, as was produced upon the trial under the former indictment; that the finding of the jury at the former trial was upon the same evidence and issue that would be had and made in the present case, and none other; that while the former indictment charged that the accused committed the offense of bigamy by marrying Gussie Shingler, and the present indictment alleges that he committed the offense by marrying Bessie Shingler, still both indictments relate to the same unlawful marriage, and both allege the same date upon which the marriage took place; the only difference in the allegations in the two indictments being in the name of the person with whom the marriage was alleged to have been con-

tracted. It appeared from the evidence that there were two Shingler sisters, one named Gussie and the other Bessie; that no marriage had taken place between Gussie and the accused, she herself being married to another on the date she was alleged in the indictment to have been married to the accused; and that the only unlawful marriage contracted by him was the one with Bessie Shingler. The name of Gussie appeared in the first indictment as the result of a mistake made by a witness who testified before the grand jury, the witness intending to give the name of Bessie instead of that of Gussie. The accused entered a plea of not guilty upon the indictment, and the issue raised by this plea and that raised by the special plea were submitted to the same jury, by whom a verdict was returned finding the accused guilty; thus, in effect, finding against the special plea. The accused filed a motion for a new trial upon various grounds. The motion was overruled, and he excepted. The only grounds of the motion which were insisted on in this court were those which alleged, in substance, that the verdict, so far as it amounted to a finding against the special plea, was contrary to evidence, and one ground which assigned error upon the admission of certain testimony.

1. It is contended that under the evidence the jury should have found in favor of the special plea setting up former acquittal, for the reason that the offense involved in the present case was the same as that for which the accused had been placed on trial and acquitted. To entitle the accused to plead successfully former acquittal, the offenses charged in the two prosecutions must have been the same in law and in fact; and, while there is no infallible test that can be applied in all cases for determining the identity of the offenses charged in the different indictments, it has been said that it is a rule of almost universal application that if the facts required to support the second indictment would have been sufficient, if proved, to procure a conviction under the first indictment, the offenses are identical. See 17 Am. & Eng. Enc. Law (2d ed.) 596, 597. See, also, 1 Archb. Cr. Proc. & Pl. (8th ed.) top page 341. The rule above referred to is that which is sometimes called the "same evidence test." There is also another rule which declares that if the prosecution under the second indictment involves the same transaction which was referred to in the former indictment, and it was or might have properly been the

subject of investigation under that indictment, an acquittal or conviction under the former indictment would be a bar to a prosecution under the last indictment. This rule is sometimes called the "same transaction test." The latter rule has been the one adopted and generally followed in this State.

In *Roberts v. State*, 14 Ga. 8, Judge Starnes, after stating that there seemed to be some difficulty about applying in all cases the rule known as the "same evidence test," says: "To avoid any confusion on this subject, we adopt the rule as it is otherwise more generally, and perhaps more accurately, expressed, viz., that the plea of *autrefois acquit* or *convict* is sufficient whenever the proof shows the second case to be the same transaction with the first." The rule thus laid down was applied in the following cases: *Holt v. State*, 38 Ga. 187; *Jones v. State*, 55 Ga. 625; *Buhler v. State*, 64 Ga. 504; *Goode v. State*, 70 Ga. 752; *Knight v. State*, 73 Ga. 804; *Knox v. State*, 89 Ga. 259, 15 S. E. 308. See, also, in this connection, *Crocker v. State*, 47 Ga. 568; *Johnson v. State*, 65 Ga. 94 (2); *Craig v. State*, 108 Ga. 776, 33 S. E. 653; *McWilliams v. State*, 110 Ga. 290, 34 S. E. 1016.

If the two prosecutions really involve the same transaction, the fact that the offense charged in the second indictment is by name a different offense from that which is set forth in the first does not prevent a judgment under the first from being a bar to the second prosecution. *Holt v. State*, *supra*. On the other hand, if the two offenses are nominally the same, but are substantially different, a judgment in one will not be a bar to a prosecution in the other. *Brown v. State*, 85 Ga. 713, 11 S. E. 831 (3). It has also been held that where a person has been put in jeopardy of a conviction of an offense which is a necessary element in, and constitutes an essential part of, another offense, such jeopardy is a bar to a subsequent prosecution for the latter offense, if founded upon the same act. *Bell v. State*, 103 Ga. 397, 30 S. E. 294, 68 Am. St. Rep. 102. See, also, *Copenhagen v. State*, 15 Ga. 264; *Pat. v. State*, 116 Ga. 92, 42 S. E. 389 (15 Amer. Crim. Rep. 290).

In *Blair v. State*, 81 Ga. 629, 7 S. E. 855, it was held that the true rule is, if the evidence required to convict under the first indictment would not be sufficient to convict under the second indictment, but proof of additional facts would be

necessary to complete the offense charged in the second indictment, the former conviction or acquittal could not be pleaded in bar of the second. In that case a conviction for selling liquor without a license was upheld, notwithstanding the accused had been convicted on another indictment of selling liquor to a minor; the two cases involving the same sale. This case apparently applies the "same evidence test," and disregards the "same transaction test." The ruling in the *Blair Case* was followed in *Smith v. State*, 105 Ga. 724, 32 S. E. 127. See, also, *Copenhagen v. State*, *supra*. What was said in *Bryant's Case*, 97 Ga. 105, 25 S. E. 450, in reference to the "same evidence test" being the true test as to whether a plea of former acquittal or conviction should prevail, was *obiter* the ruling in that case being entirely consistent with the known as the "same transaction test." Without reference to which is the sounder rule, the "same evidence test," or the "same transaction test," the latter has been, since the decision in 14 Ga., generally accepted as the rule in this State. Under this rule, it becomes necessary in each case to determine whether both indictments, and the investigations that may be had thereunder, relate to the same offense; that is, in order to successfully defeat a prosecution under the last indictment, it is incumbent upon the accused to identify the offense charged in the second indictment with that which was, or could have been, made the subject of investigation under the first indictment.

In *Sweeney v. State*, 16 Ga. 468, Judge Benning said: "But in all pleas of former acquittal or former conviction, the proof of the plea has to consist partly of matter of record and partly of matter not of record. And the identity of the two cases is the part of the plea which it is the peculiar business of the evidence which is not of record to make out."

In determining whether the two offenses are identical, we must not look to the indictment alone or to the proof alone, but to both the proof and the indictment. If the evidence offered under the issue formed upon the special plea shows that no other transaction than that sought to be investigated under the second indictment could have properly been the subject of investigation under the first, then an acquittal under the first indictment would be a bar to a prosecution under the second, notwithstanding the fact that there could not have been a con-

viction under the first indictment, for the reason that the proof offered in support of it failed to establish allegations descriptive of the offense ordinarily immaterial, but which the pleader had made material by averment. Thus it was held in *Buhler's Case, supra*, that where the accused had been indicted for stealing a cow which was the property of H., and had been acquitted, and he was again indicted for stealing a cow which was the property of H., the description being different from that alleged in the first indictment, and it appeared on the trial that H. had only one cow, and this cow was the one referred to in both indictments, and the testimony in each case related to this cow, a verdict finding against the plea was contrary to law. And in *Goode's Case, supra*, it appeared that the accused was tried and acquitted under an indictment charging him with larceny from the house, and alleging ownership of the house and the goods stolen in the prosecutor, and was subsequently arraigned upon another indictment for larceny from the house; the indictment alleging a different ownership of the house and the goods stolen. It was held that a plea of former acquittal which set out fully the first indictment and the proceedings had thereon, and averred that the transactions embraced in both indictments were one and the same, was improperly stricken on demurrer. To the same effect was the ruling in *Knight's Case, supra*. In all of these cases it appeared that the indictment referred to the same property and the same theft, and that the theft referred to in the first indictment in each case could have been properly investigated thereunder, although, on account of a variance in regard to description in identity of the property or ownership, a conviction could not be had. If it had appeared from the second indictment in the *Buhler Case* that the animal alleged to have been stolen was and could not have been the same animal referred to in the first indictment, then, of course, no proceedings under the first indictment would have affected a prosecution under the second; that is, to take an extreme case, if it had appeared in the first indictment that *Buhler* was charged with having stolen a cow, and in the second indictment for stealing a bull, then no proceedings had under the first indictment would affect the right of the State to prosecute under the second; and this would be true notwithstanding it appeared from the evidence upon the issue formed upon the special plea setting

up former acquittal that the draftsman of the indictment by mistake described the animal as a bull, when it should have been described as a cow. *Goode's* and *Knight's Cases* are subject to a similar explanation. The ruling in the *Knox Case*, *supra*, was based upon the ruling in the three cases just referred to; and, even if it is not subject to the same explanation as the other cases, it was a decision by two justices only, and is not controlling as authority. In the present case the first indictment charged an unlawful marriage with Gussie Shingler. The proof showed that there was such person as Gussie Shingler. But whether this was so or not, under the first indictment there could not have been a legal investigation in reference to an unlawful marriage by the accused to any other person than the one named in the indictment. Evidence of a marriage by the accused with Bessie Shingler would not have been admissible under the first indictment. While the offense charged in each indictment is the same, in general terms—that is, bigamy—an unlawful marriage to a particular person is an essential element in this offense, and the allegation and the proof in reference to this person must correspond. The offenses charged in the two indictments are not, therefore, identical. In the absence of any evidence at all, the indictments, on their face, show that they could not involve the same transaction. In the light of the evidence that Gussie Shingler and Bessie Shingler were separate and distinct persons, the view is strengthened that it was impossible under the first indictment to investigate the subject of a marriage by the accused with any other person than the one therein named. It is immaterial whether we apply the “same transaction test” or the “same evidence test;” the finding against the special plea was proper. The “additional fact test” and the “essential ingredient test,” which have been alluded to above, have no application to a case of the character now under consideration. It is immaterial what the pleader intended when the indictment was drawn. It is also immaterial what the grand jury intended when they found the first indictment. It is immaterial that both the pleader and the grand jury had in mind but one marriage, and that the indictment intended to charge that this marriage was contracted. Under the indictment as it was framed, no other transaction could have been properly the subject of a legal investigation than an unlawful marriage between the accused and

Gussie Shingler. An unlawful marriage with Bessie Shingler was a separate and distinct transaction from the alleged marriage between him and Gussie Shingler. The finding against the plea of former acquittal was demanded by the evidence offered to support the same.

2. The only other question argued in the brief of counsel for the plaintiff is that raised upon an objection to the admission of evidence set forth in the fourth ground of the motion for a new trial. The evidence objected to was as follows: Lawrence, a witness for the State, testified: "I found a woman and seven children near Lemay, North Carolina, and I called upon her, visited her home, and showed her the picture of C. R. Bridges—the picture that you have there is the one that I showed her—and she recognized it as the picture of C. R. Bridges. She bore the name of Annie Gully, but her maiden name was Bridges. I found that by her marriage certificate in her Bible and her own statement, and how she is known there through the country—it was general repute that that was her name." The motion for a new trial assigns error upon the admission of this evidence in its entirety, and says that the evidence was inadmissible because it was hearsay. Counsel for the plaintiff in error, in his brief, argues that the statement that Annie Gully recognized the picture shown her as the picture of her husband was hearsay, and improperly admitted. Let it be conceded that this was a valid objection to that much of the testimony. The objection went to the whole of the evidence, and, if any part of it was admissible, the objection was properly overruled. See *Penitentiary Co. v. Gordon*, 85 Ga. 160, 168, 11 S. E. 584 (5); *Lumber Co. v. Brinson*, 94 Ga. 517, 20 S. E. 437 (1); *Chambers v. Wesley*, 113 Ga. 343, 344, 38 S. E. 848 (2), and cases cited. It appeared from the evidence that the accused had admitted that his real name was Gully, that he had a wife and children living in North Carolina, and that her maiden name was Bridges. It was therefore competent for the witness to testify that at a given place in North Carolina, which he had visited, he found a woman with seven children, who was reputed in the neighborhood to be named Annie Gully, and that there was a like repute that her maiden name was Bridges. So much of the testimony offered was inadmissible. As to what weight should be given it was an entirely different question. What this witness said in reference to the

picture of Bridges was inadmissible, but as the objection was to the whole testimony, and part of it was admissible, the objection is overruled.

Judgment affirmed. All the justices concurring, except LUMPKIN, P. J., absent on account of sickness, and CANDLER, J., not presiding.

McNULTY v. STATE.

110 Tenn. 482—75 S. W. Rep. 1015.

Decided June 6, 1903.

FORMER ADJUDICATION: *Statute relating to conviction for lesser offenses construed—Conviction for assault and battery no bar to indictment for murder—Practice as to filing plea.*

1. A conviction for an assault and battery is not a bar to subsequent indictment for homicide, the death being a result of the same assault, especially so where the death did not occur until after the previous conviction.
2. This doctrine is not changed by the statute, which provides as follows: "In all criminal cases in which a defendant shall have been brought before a justice of the peace under the provisions of the small offense law, and shall have submitted and been fined in manner and form as provided by law, and shall thereafter be indicted or presented for the same identical offense as a felony, said defendant may plead said former conviction as a bar to any conviction of a misdemeanor felony, provided the jury shall find the plea of the former conviction valid under the present laws of this State." This statute simply protects the defendant from being again convicted for the misdemeanor, as it is included in the felony charge.
3. The accused was on trial for murder. After the State had closed its proof, he tendered a plea that he had theretofore been convicted of the assault and battery as of the same matter charged, but did not show any excuse for the delay in pleading it. The court refused to permit the plea to be filed. *Held*, that as no excuse was given for the delay, the court did not err in exercising its discretion in refusing to allow it to be filed; also, that the plea was without merit in law, and referred to a conviction antedating the homicide in question.

Supreme Court of Tennessee.

Appeal from the Criminal Court, Shelby County; Hon. Jno. T. Moss, Judge.

Charles McNulty, convicted of manslaughter, appeals. Affirmed.

J. J. Dubose, for the plaintiff in error.

The Attorney General, for the State.

SHIELDS, J. Chas. McNulty, plaintiff in error, upon his plea of guilty to a warrant issued by a justice of the peace of Shelby County, January 15, 1903, charging him with assault and battery upon one Cottrell Childress upon a previous day of that month, was fined \$50, and committed to the workhouse. Childress died about 30 days thereafter from injuries sustained from the assault and battery committed upon him, and the plaintiff in error was indicted for his murder in the Criminal Court of Shelby County, and upon trial was found guilty of voluntary manslaughter, and his punishment fixed at two years in the State Penitentiary.

After the State had closed its case, and the plaintiff in error had been examined as a witness in his own behalf, his counsel tendered to the court a plea stating the proceedings before the justice of the peace, and relying upon them, and the judgment there given against the plaintiff in error, as a former conviction, in bar of the indictment under which he was then being tried, without any affidavit explaining why it was not tendered at the proper time. The trial judge refused to allow the plea to be filed, and directed the trial to proceed upon the plea of not guilty. This action is now assigned as error.

There was no error in the refusal of the trial judge to allow the plea tendered to be filed. It should have been tendered, along with the plea of not guilty, before the trial was begun; and not having been tendered until the State had closed the evidence in its behalf, and the plaintiff, in error was introducing his, and the delay not being satisfactorily explained, it was within the discretion of the court to refuse permission for it to be then filed. But the action of the trial judge was correct upon the merits. The plea did not set forth a meritorious and valid defense to the indictment. The facts stated in it did not show that the plaintiff in error had once been in jeopardy for the offense for which he was then being tried—the murder of Cot-

trell Childress. The proceeding had against him was for a misdemeanor—assault and battery.

The indictment in this case is for a felony—murder committed upon Cottrell Childress—a greater offense, containing other and materially different elements from the former one, and requiring different proof to convict, and which had not been committed and was not in existence when the first trial was had, Childress being alive. The two offenses are entirely distinct, and the identity necessary to sustain a plea of the former conviction is wholly wanting.

It is well-settled law that a conviction of a misdemeanor included in a felony is no bar to a prosecution for the felony, and certainly this rule must prevail when the felony is not consummated until after the conviction of the misdemeanor, as was the murder in this case by the death of the assaulted party after the judgment before the justice of the peace. *Mikels v. State*, 3 Heisk. 321; Clark's Crim. Prac. pp. 402, 403. It is, however, insisted by counsel for plaintiff in error that this rule has been abrogated in this State by statute; and chapter 27, p. 31, of the Acts of 1870-71 (Shannon's Code, § 7180), is relied upon to sustain this contention. It is as follows: "In all criminal cases in which a defendant shall have been brought before a justice of the peace under the provisions of the small offense law, and shall have submitted and been fined in manner and form as provided by law and shall thereafter be indicted or presented for the same identical offense as a felony, said defendant may plead said former conviction as a bar to any conviction of a misdemeanor felony, provided the jury shall find the plea of the former conviction valid under the present laws of the State.

This statute will not bear the construction insisted upon, but it is plainly to the contrary. It is unmistakably provided that a conviction under the small offense law for a misdemeanor included in a felony may be pleaded in bar of another conviction of the same misdemeanor under an indictment against the defendant for the felony involved, and upon which he is being tried for such felony. It does not provide that a conviction for the misdemeanor shall be a bar to a prosecution for the greater offense, the felony, and was never intended to have that effect. It will not be presumed that the General Assembly intended to

provide such a convenient mode for felons to escape their merited punishment.

The failure to file a plea at the proper time being unexplained, and no merits being shown, the assignment of the error is overruled, and the judgment affirmed.

STATE v. JACKSON.

106 La. 413—31 So. Rep. 52.

FORMER JEOPARDY—INCOMPETENT TESTIMONY: *Jeopardy does not attach where a case is tried without a jury, if jury is by the Constitution required—Introduction of an affidavit prejudicial, even if for another purpose than proof of the matter stated in it.*

1. A former trial cannot be made the basis of a plea of once in jeopardy, when it was had before the judge, instead of before the jury, in a case in which, under the Constitution, the prisoner could not waive trial by jury.
2. The affidavit on which the defendant was arrested on the charge on which he is being tried is inadmissible in evidence against him; and since such affidavit is a sworn declaration of the defendant's having committed the crime for which he is on trial, and is therefore of a nature to make an impression on the minds of the jury, its admission in evidence is reversible error.
3. Whether such affidavit is ever admissible, it is certainly not so to prove that a certain witness had not made it, when the fact of the said witness not having made the affidavit has already been established by the witness, and is, besides, not material to the issue.

(Syllabus by the Court.)

Supreme Court of Louisiana.

Appeal from Judicial District Court, Parish of St. Martin;
Hon. T. Don Foster, Judge.

Jacob Jackson, alias Shamp, convicted of crime, appeals. Reversed.

Edward Simon, for the appellant.

Walter Guion, Attorney General, and *Anthony N. Muller*, District Attorney, (*Lewis Guion*, of counsel) for the State.

PROVOSTY, J. A first conviction of defendant having been set aside on the ground that the trial had been before the judge,

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when the case was one in which, under the Constitution, a jury could not be waived, and the defendant having been brought to trial a second time, he pleaded once in jeopardy, basing himself on the first trial. It is very plain that, since the first trial could not possibly have resulted in a legal conviction, the defendant was not by it put in jeopardy. For jeopardy to exist, the court must be competent to try the case. Am. & Eng. Enc. Law, "Jeopardy."

The court admitted in evidence the affidavit on which the defendant had been arrested. This was error. Affidavits are not legal evidence in criminal cases, no more than is hearsay; and the error is reversible error, since the affidavit was a sworn declaration of the defendant's having committed the crime for which he was on trial, and, therefore, may have influenced the jury. In explaining why he admitted the evidence, the judge says that the defendant's counsel had asked a witness, in a "peremptory and assuming manner," the question, "Why did you make this affidavit against the accused?" that the question had been asked in this manner in order to create upon the minds of the jury the impression that the witness was prejudiced against the accused; and that the affidavit was admitted for the purpose of showing that the witness had not made it, thereby to counteract the effect sought to be produced on the jury. The witness had testified that he had not made the affidavit. Therefore there was no necessity for introducing the affidavit to prove that fact; and if in any case an affidavit may be admitted to prove, *rem ipsam*, of who made or did not make it, this is not such a case. That the evidence was introduced for a stated purpose, not on the question of the guilt or innocence of the prisoner, does not cure the situation. After evidence is in for a stated purpose, there can be no guaranty that the jury will not consider it for other purposes. It has been held that the admission of improper evidence cannot be cured by the judge's giving instructions to the jury that they are to disregard such evidence. Rice, Cr. Ev. p. 415.

It is therefore ordered, adjudged, and decreed that the verdict and sentence herein be set aside, and that the case be remanded to be proceeded with according to law.

STATE v. STATON.

133 N. C. 642—45 S. E. Rep. 362.

Decided September 22, 1902.

FORMER JEOPARDY—INDICTMENT: *Double intent charged in the indictment—Indictment sufficient—Acquittal or conviction of lower grade a bar to prosecution for higher; thus, evidence of the higher grade sustains indictment for the lower grade—Practice—Question of intent comes too late when raised for the first time on appeal.*

1. An indictment which charges that the accused "did break and enter (otherwise than by burglarious breaking), the dwelling house of one Bettie Grimes, with intent to commit a felony, to-wit, with intent the goods and chattels of the said Bettie Grimes, then and there in said dwelling house being found, feloniously to steal, take and carry away, and with intent feloniously and violently, and against the will of the said Bettie Grimes, to carnally know and abuse," etc., sufficiently charged the intent.
2. Where one crime is a necessary element, and constitutes an essential part of another crime, an acquittal or conviction of one is a bar to a prosecution for the other, if both refer to the same criminal transaction. Hence, an indictment charging a statutory breaking and entering is sustained by proof of the higher crime of burglary in the first degree.
3. The question as to whether or not there was sufficient proof of intent, will not be heard for the first time on appeal.

Supreme Court of North Carolina.

Appeal from Superior Court, Pitt County; Hon. G. S. Ferguson, Judge.

Fate Staton, convicted of statutory burglary, appeals. Affirmed.

Skinner & Whedbee, for the appellant.

Robert D. Gilmer, Attorney General, for the State.

CONNOR, J. The defendant was put upon trial upon the following bill of indictment: "The jurors for the State upon their oaths present that Fate Staton, late of the County of Pitt, with force and arms, at and in the County aforesaid, unlawfully did break and enter (otherwise than by burglarious breaking), the dwelling house of one Bettie Grimes, with in-

tent to commit a felony, to-wit, with intent the goods and chattels of the said Bettie Grimes, then and there in said dwelling house being found, feloniously to steal, take and carry away, and with intent feloniously and violently, and against the will of the said Bettie Grimes, to carnally know and abuse, against the form of the statute," etc. The defendant moved to quash the bill of indictment for the reason that the bill attempted to particularize the felony, with the intent to commit which the defendant is alleged to have entered the house of the prosecutrix, to-wit, that of larceny or rape, and that the language used in the bill did not amount to a charge of rape. The motion was overruled, and the defendant excepted.

His Honor correctly refused the motion to quash. The language of the bill in charging the intent with which the defendant entered the house is sufficient. *State v. Tylus*, 98 N. C. 705, 4 S. E. 29; *State v. Powell*, 94 N. C. 965, 970.

The State introduced testimony tending to show that at 12 o'clock on the night of July 28, 1902, the defendant broke into the house of the prosecutrix by prizing open the window sash, and that the prosecuting witness was in the actual occupation of the house at the time, and that the defendant was in his night clothes when he entered and left the house, and that he did not attempt to steal anything. The defendant offered evidence tending to show that he did not enter the house, and to prove an *alibi*.

The defendant requested the court to charge the jury that the defendant cannot be convicted under the bill of indictment, for the reason that if they believed the evidence for the State to be true, and that should the evidence convince them that the defendant was the person who broke into the house, in that event the defendant would be guilty of burglary in the first degree, and as this indictment and trial would not prevent his being put on trial for the greater offense of common-law burglary, they would acquit the defendant. The Court declined to give the instruction, and the defendant excepted.

His Honor committed no error in this respect. The defendant's prayer was based upon the assumption that his conviction upon this bill would not sustain a plea of former conviction upon an indictment for burglary based upon the same facts. This view seems to be met and disposed of in the case

of *State v. Cross*, 101 N. C. 778, 7 S. E. 704, 9 Am. St. Rep. 49, Smith, C. J., referring to the case of *State v. Shepherd*, 7 Conn. 54, says: "It was decided that a conviction of an attempt to commit rape upon an indictment so charging was proper when the proof showed the rape was accomplished, and such conviction was a bar to another indictment preferred for the rape. And so it is held in *State v. Smith*, 43 Vt. 324, and the general principle is laid down that when an offense is a necessary element in, and constitutes an essential part of, another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution of the other." This authority fully sustains his Honor's refusal to instruct the jury as requested. The defendant did not ask his Honor to instruct the jury that there was not sufficient evidence of the intent with which the defendant entered the dwelling. Such objection must be taken before verdict, and it cannot be made for the first time in the Supreme Court. *State v. Glisson*, 93 N. C. 506.

No error.

STATE v. HAGER.

61 Kan. 504—48 L. R. A. 254—59 Pac. Rep. 1080.

Decided February 10, 1900.

FORMER JEOPARDY—PRACTICE: *When a discharge of a jury for failure to agree or for other reason will not sustain a plea of former jeopardy—A hearing followed by a discharge upon such a plea does not constitute former jeopardy.*

1. A plea of former jeopardy is a special plea of matter in bar which is not involved under the general issue or plea of not guilty, and therefore it should be heard and determined apart from the main issue. Such plea not being of matter which goes to the question of the innocence of the accused, a hearing upon it is not a jeopardy, and an order sustaining it, and discharging the defendant, may be appealed by the State as a question reserved, and, in the event of a reversal of such order on the State's appeal, the defendant may be rearrested and held for trial.
- 2 Where the record of the trial of a criminal case shows that the

jury "were absent some time considering of their verdict," and upon being returned to the jury box the foreman, in reply to an inquiry by the court, stated, in the presence of the remainder of the jury and without dissent by any of them, that there was no probability of their agreeing upon a verdict, and the court thereupon discharged them, "because they were unable to agree upon a verdict," held, that such record does not show an arbitrary or unreasonable exercise of the court's authority in discharging the jury, but does show facts from which a presumption of a correct exercise of judicial authority arises, and that it will not support a plea of former jeopardy when the defendant is again put upon trial.

(Syllabus by the Court.)

Supreme Court of Kansas.

Appeal from District Court, Jackson County; Hon. C. F. Johnson, Judge.

George Hager was indicted and tried for grand larceny. The jury disagreed and were discharged, and, the case was continued to the next succeeding term, at which term the defendant filed a plea of former jeopardy, which plea was sustained, and the State appealed. Reversed.

H. F. Graham, County Attorney, and *Hayden & Hayden*, for the State.

Crane & Woodburn and *J. A. Rokes*, for the appellee.

DOSTER, C. J. This is an appeal by the State upon a question reserved by it. The defendant in the court below interposed a plea of former jeopardy, which, upon hearing and consideration by the court, was sustained, and an order made for his discharge. The defendant had been informed against for grand larceny. Upon the trial of his case the jury reported they were unable to agree, whereupon they were discharged from further consideration of the case. The action was continued to the next succeeding term, and at that term the defendant filed his plea of former jeopardy. In this plea he alleged that, at the trial of his case the preceding term, "the jury were arbitrarily discharged, without a verdict, from the consideration of the case, and without any sufficient or lawful reason therefor, to which discharge defendant excepted, and, having once been in jeopardy, he cannot again be placed upon trial." The evidence in support of this plea was, of

course, the record of the former proceeding. The material portion of the record was as follows:

"The said jury retired in charge of a sworn bailiff to consider of their verdict; and, after being absent some time in consideration of their verdict, they were duly returned to the jury box, and the court duly inquired of the foreman whether they had agreed upon a verdict, and was informed by said foreman that they had not. The court then inquired of said foreman, 'Is there any probability of your doing so?' and was answered by said foreman, 'There is not.' The jury was by the court thereupon discharged from the further consideration of the cause, because they were unable to agree upon a verdict."

We have delayed the determination of the case to give consideration to a question involved in it, but which was not argued by counsel. That question is as to the effect of the defendant's discharge upon the hearing of his plea of former jeopardy. Can he, in the event of a reversal of this case upon the State's appeal, be again arrested and held for trial, or was the hearing given him upon his plea of former jeopardy itself a jeopardy, which he may plead in bar when again brought to trial? If the latter should be the case, the question presented to us as to the effect of the discharge of the jury on the first trial would be moot in its nature, and would not be considered by us. *State v. Rook*, 61 Kan. 382, 59 Pac. 653. The subject, as we now view it, in the light of the authorities, is quite free from doubt, although it did not appear so when first occurring to us.

Our conclusion is that a hearing upon a plea of former jeopardy alone is not itself a jeopardy, and a discharge upon such hearing is not an acquittal. Pleas of former acquittal or conviction, or former jeopardy, are special pleas of matter not properly involved under the general issue or plea of not guilty. Such being the case, they should be heard and determined apart from the main issue. Whart. Cr. Pl. §§ 419, 420, 429; Bish. New Cr. Proc. §§ 799-805. Therefore, a plea of former acquittal, not being of matter involved in the general issue—and not being of matter which goes to the question of guilt or innocence—a judgment sustaining it cannot be in the nature of an acquittal. If such were the case, a judgment against a defendant overruling his plea of former

acquittal would be a former conviction, and could be pleaded as *autrefois convict* to the indictment when again called for trial. Hence the defendant could always escape punishment by pleading a former acquittal to the indictment against him, because, if the plea should be found against him, it would be a former conviction; if in his favor, a former acquittal. For the same reasons a plea of former jeopardy, whether determined one way or the other, cannot be regarded as involving the merits of the case. It does not reach to the question of guilt or innocence, and, if determined in defendant's favor, the State may have an appeal upon the question, if reserved by it. There seems to be some contrariety in the decisions as to whether the defenses of former acquittal, conviction, or jeopardy may be heard under the general issue (9 Ene. Pl. & Prac. 630); but we think there are no decisions holding that such defenses, when made under the general issue, are not triable separately from the main question, or, at least, no decisions holding that a hearing upon the special defense is itself a former jeopardy, and a judgment upon it alone a former conviction or acquittal.

The question now recurs, was the plea of former jeopardy sustained by the record? It is undeniable that the arbitrary and unnecessary discharge of a jury before which an accused person is tried, without a verdict, operates also to discharge the defendant. In such case he has been once in jeopardy. That jeopardy, terminating without fault upon his part and from no overweening necessity, cannot be renewed and the accused again called upon to defend himself. Compare *iv. Proc.* § The Civil Code (Gen. Stat. 1897, Ch. Sec. 20; Gen. Stat. 1899 Sec. 4544), provides: "The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing." The provisions of this section are made applicable to trials of criminal cases. (Gen. Stat. 1897, Ch. 102, sec. 201; Gen. Stat. 1899, Sec. 5458.) Authority for the discharge of a jury trying a criminal case therefore exists if "they have been kept together until it satisfactorily appears that there is no probability of their agreeing." The tribunal primarily intrusted with the duty of determining whether a jury has been

kept together until there is no probability of their agreeing is the trial court. The questions whether they have been so kept together, and whether there is a probability of their agreeing, are judicial questions. As such, they cannot be arbitrarily or capriciously determined by the court. The court must be satisfied that the jury, in all probability, cannot agree to a verdict before it should order their discharge. However, when it does become of that conviction, and enters it of record, the correctness of its view and the soundness of its conclusions are not subject to review, unless the record of its action discloses it to be in error. Unless the record discloses hastily formed conclusions, immature judgment, or capricious conduct, the action of the trial judge cannot be reviewed by this or any other court.

In *State v. Allen*, 59 Kan. 758, 54 Pac. 1060, the record of the former trial recited that, "the jury not having agreed upon a verdict in the above entitled cause, the jury is discharged from further consideration of this case." It was therefore held that the existence of no proper or necessary grounds for the discharge of the jury had been shown, but that something more should have appeared than that the jury had not agreed upon a verdict. It should have been shown that there was no probability of their agreeing. The present case, however, is different. Here it appeared, not merely that the jury had failed to agree, but that upon inquiry of the foreman, in the presence of his fellows, he had stated that there was no probability of their being able to agree. This statement of the foreman, the usual spokesman of the panel, in the presence of the remainder of the jurors, and not dissented from by them, must be regarded as their conclusion as well as his. In addition to the inquiry addressed by the court and answered by the foreman, it appears from another recital of the record that the jury had "been absent some time, in consideration of their verdict," before they were again brought into the presence of the court. How long they had been absent does not appear, but we must indulge the presumption that it had been for such a length of time as to enable the court to regard it as some evidence of inability to reach a conclusion. The record further shows, in connection with its recitals of absence of the jury for "some time in consideration of their verdict," and inquiry and answer as to the probability of an

agreement, that the jurors were thereupon discharged "because they were unable to agree upon a verdict." It would appear, therefore, that the court acted according to judicial methods in discharging the jury. He took into consideration the length of time, whatever that may have been, the jury had been in consideration of their verdict, and the statement of the foreman, in the presence of the remainder of the jury, and presumably assented to by them, because not dissented from, that they were unable to agree upon a verdict. From these facts he evidently deduced the conclusion that there was no reasonable probability of their being able to agree. While the record of the proceedings was not made as full as such records ought to be made, yet it is sufficiently full to prevent us from saying that the court below erred.

While in *State v. Allen*, *supra*, it was held that the court had erroneously discharged the jury under the particular circumstances of that case as disclosed by the record, yet the rule was distinctly announced that "the length of time a jury should be kept together, and the probability of an agreement, must be determined by the trial court from the facts and circumstances of the particular case, and its decision will be conclusive, unless it has abused its discretion in that regard." This statement of the rule is in harmony with the holdings of nearly all the cases. Mr. Bishop says: "The result (of the authorities) would seem to be that when he (the judge) concurs in and affirms the jury's conclusion of inability to agree, and discharges them, the fact so found, the existence whereof nullifies the seeming jeopardy, is absolute and irreversible." 1 Bish. New Cr. Law, § 1041. An instructive and valuable case, reviewing many of the decisions upon the subject, and showing the rule to be as above stated by Mr. Bishop, and also as herein stated, is *State v. Reinhart*, 26 Or. 466, 38 Pac. 822.

We think the plea of former jeopardy was improperly sustained. The judgment of the court below sustaining it is therefore reversed, with directions to proceed with the trial of the case.

THROWER v. STATE.

117 Ga. 753—45 S. E. Rep. 126.

Decided June 26, 1903.

GAMING HOUSE: *Keeping a gaming house was a common law offense*
—*The statutory offense in Georgia includes book-making on*
horse race—Evil effect of gaming-houses—Review of authorities.

1. At common law keeping a gaming-house was an offense, although no form of gambling was then punishable, and gaming contracts were enforced by the courts.
2. Prior to the first Penal Code, this common law offense of keeping a gaming-house was punished in Georgia.
3. The same offense is defined by Penal Code 1895, sec. 398, which makes keeping a gaming-house a misdemeanor, without reference to the character of the games there carried on.
4. "Betting on a horse race is gaming within the meaning of the Code."
5. One who maintains a house for the purpose of such gaming is guilty of keeping a gaming-house, even though betting on a horse race is not prohibited by statute, and though the race be run in a different State.
6. The statute is not aimed at the games or the players, but against keeping a house where gaming of any sort is encouraged, and because of its tendency to corrupt morals and to ruin fortunes.
(Syllabus by the Court.)

Supreme Court of Georgia.

Error to Superior Court, Fulton County; Hon. L. S. Roan, Judge.

Montgomery Thrower, convicted of keeping a gaming house, brings error. Affirmed.

Arnold & Arnold, for the plaintiff in error.

C. D. Hill, Solicitor General, and *Rucker & Rucker*, for the State.

LAMAR, J. The defendant was indicted under the Pen. Code 1895, § 398, for "keeping a gaming house," and upon the trial was found guilty. It appears that he was the proprietor of what is called a "turf exchange," at which large numbers of persons daily congregated for the purpose of betting on horse races run in distant States, but reported at the

exchange by telegraphic dispatches. The odds against every horse in any race were posted on a blackboard in the room. While not given in detail, we understand, from what is stated as to the method of posting, that the following would illustrate what is placed on the board: 2 to 1 against horse A; 2 to 1 against horse B; 3 to 1 against horse C; 3 to 1 against horse D; 4 to 1 against horse E. Persons desiring to bet would select a horse, pay \$1, and receive a ticket showing the sum to which he would be entitled in case that horse won. The proprietor was, in effect, a bookmaker, and backed the field, being bound to win, if he could get takers enough to make the book on each race, and could keep the amount of his heaviest odds less than the total stakes put up by the individual betters in each race. 3 Ency. Brit. 618. The details would be changed because single "books" were not made, but the principle would probably be the same where money bets were made or tickets sold. In the instance above given he received \$5. His heaviest loss could be only \$4, and he might lose only \$2. At any rate, one of the witnesses lost \$7,000 at this exchange, and many others smaller amounts. The evidence is that many attended, and the betting was constant, those backing the successful horse winning in each race, often heavy odds, but the greater number, of course, being bound to lose, and the exchange to gain, these gains being sure and certain if only takers enough were to be had, and all the odds sold. This being an element of uncertainty against the proprietor, it was desirable to have a clearing house or place in which to gather a crowd, and the "turf exchange" is the modern expedient to secure that result. But the plaintiff in error insists that he was not keeping a gaming house, because no game was played. The races occurred in distant States; and, betting on a horse race not being itself a criminal offense, it cannot be an offense to maintain a place where such betting was allowed.

The act, as published in Cobb's Digest, p. 815, and in the Code of 1863, § 4423, is subdivided by a semicolon, and makes even clearer what is apparent upon an investigation of the statute as now published in Pen. Code 1895, § 398. It creates three separate offenses: (1) Whoever keeps a gaming house is guilty of a misdemeanor. (2) If he does not keep and control the house, but merely permits it to be used

by other persons as a place where betting on games or devices is carried on, he is guilty of a misdemeanor. (3) If he knowingly rents the house to be used for such purpose, he is guilty of a misdemeanor. And in section 392 it is further provided that, if he keeps a house to the *encouragement* of gaming, he is guilty. Keeping a gaming house is a separate, well-defined offense, and entirely independent of the criminality of the betting carried on therein. The statute is aimed at the place, not at the players, nor at the game, nor at the subject-matter of the wager. At common-law keeping a gaming house was an offense before any sort of game was prohibited, and was punished when gaming was not even against public policy, when the courts recognized such contracts, and by solemn judgment made the loser pay his bet. But to maintain a place for the purpose of inducing men to gather and game was a common nuisance, because of its tendency to corrupt morals and ruin fortunes. *United States v. Dixon*, 4 Cranch, C. C. 107, Fed. Cas. No. 14,970. The game might be harmless, or, if in private, only the immediate actors would be affected; but when the public were invited, when there were always present those ready and anxious to stake, when the gains of one excited others to participate, when the pride of public success stimulated the winner, and the loser attempted to hide the mortification of defeat by a bold front until the last coin was gone, the law was bound to interfere. The English rule and our own statute are both based on the recognition of the cumulative evil which may inhere in a multiplicity of acts not themselves criminal. Idleness is not a crime, but an aggregation of innocent idleness may culminate in the crime of vagrancy. Pen. Code 1895, § 453. To allow liquor to be drunk on one's premises on Sunday is not made an offense, but to keep a place where persons may congregate for that purpose is to convert the building into a tippling house. The non-criminality of the drinking does not save the house keeper. Id. § 390. A single act of noise may be innocent, but, continued too long, the harmless disorder makes the owner the keeper of a disorderly house. Id. § 392. Betting on a game or an event not made penal is not an offense, but to keep a house for that very purpose will ripen into a crime. Keeping a gaming house, a tippling house, or a disorderly house are all made offenses by the Penal Code, because, while acts done

therein are not crimes, they lead to crime. Such places are hotbeds; and the maintenance thereof is prohibited in pursuance of the preventive policy of the law, in an endeavor to save the idle and the dissolute from themselves, and to prevent the misery and loss which wait on those who frequent such places. The wholesale gaming and the evil consequences arising from the keeping of a "turf exchange" are as great, if not greater, than those flowing from the maintenance of any other gaming place; and the proprietor can only escape the consequences by showing that his is not a gaming house within the meaning of the statute.

The words "wagering," "playing," "gaming," and "betting," though each having a meaning more or less different from the other, are often used one for the other. The statute, in prohibiting gaming, does not intend to prohibit amusement, sport, recreation, or diversion, but is aimed at the hazarding of money on certain prohibited games and devices. In prohibiting a gaming house it is intended to prevent the maintenance of a *place* at which persons come together for the purpose of hazarding and betting money, whether the subject-matter of a single bet is or is not made penal. There is a difference between gambling and gaming. In defining gaming contracts the Code refers to contracts in which money has been wagered, although there may be no sport, no skill, no element of contest between those betting; and therefore, while some few courts rule that betting on a horse race is not even gaming, most others (14 Am. & Eng. Enc. L. [2d ed.] 682, notes 1, 2) decide it to be gaming, and our own court has held that "betting on a horse race is gaming in the sense of the Code." *Dyer v. Benson*, 69 Ga. 609. It may not be gambling, but it is gaming, and, if so, a person who maintains a place where such betting is carried on as a business is keeping a gaming house. The gaming or betting goes on therein, although the race itself may be conducted elsewhere. No one will deny that the young man who lost his \$7,000 could have recovered it had he sued in time, under the provisions of Civ. Code 1895, § 3671, even though it were lost in gaming on races run in New York, Saratoga, or Sheepshead. It was gaming, and gaming in this very house, and the owner was keeping a gaming house, even if betting on a horse race is not itself punished under the Penal Code.

To the decisions cited by counsel may be added that of *State v. Corporation of Savannah, T. U. P. Charlt.* 238 (decided in 1809), from which it appears that, long before our first Penal Code, "keeping a gaming house" was recognized as "a nuisance, and an offense against the public policy, and a part of that law which our ancestors brought from England, and not impaired by our fundamental laws." It is true that since 1833 we have had only statutory offenses. *White v. State*, 51 Ga. 288. But where the common-law crime has been adopted, and common-law terms used in its definition, the construction previously placed thereon by the English courts becomes by intendment a part of the adopting statute. Pol. Code 1895, §§ 1, 4 (9). It would seem clear, therefore, that when the Legislature, in concise but comprehensive language, declared that "keeping a gaming house is a misdemeanor," it had in mind the English law on the same subject, under which the crime was committed when the house was kept for the purpose of gaming, regardless of the criminality or character of game, wagering, or betting carried on therein.

The conviction is amply sustained under the language of our Code and the common-law authorities thus incorporated into our law. The rulings in other States, we think, all tend to support the same conclusion. The statutes were different in some respects, but the reasoning of the courts on facts almost identical to those at bar is strongly in point. "If the room is one whose use is intended to facilitate gaming operations, and where sporting characters are invited to congregate for purposes of illegal amusement or gain, and to stake money upon trials of chance, skill, or endurance, we seem to have everything necessary to constitute a gaming room. That some or all of the games or trials are innocent is of no importance"—citing *Clayton v. Jennings*, 2 W. Bl. 706. "It is not necessary that persons be present at the place of game or contest in order that they may participate in the mischiefs of gaming. * * * Nothing seems more unimportant than that the gaming—the part that in itself is innocent, and which only furnishes the occasion, and gives opportunity for the criminality—is at a distance." *People v. Weithoff*, 51 Mich. 203, 16 N. W. 442, 47 Am. Rep. 557. The purpose of the Florida statute was like ours, and to "prohibit, not the gaming itself, but the keeping of a house for any manner of gaming. If a

house is kept for the purpose of having money bet therein upon any result or event whatsoever, such house falls within the inhibition of the statute, whether the means adopted for the decision of the question as to who is the winner or loser of the thing wagered be prohibited by law or not." *McBride v. State*, 39 Fla. 442, 22 South. 711, where the facts were almost similar to those at bar, and where the court says that its conclusion is supported by the following cases exactly similar in their facts: *Swigart v. People*, 154 Ill. 284, 40 N. E. 432; *People v. Weithoff*, 93 Mich. 631, 53 N. W. 784, 32 Am. St. Rep. 532. It is unnecessary to quote further, but see *Bollinger v. Com.*, 98 Ky. 574, 35 S. W. 553; *State v. Stripling*, 113 Ala. 120, 21 South. 409, 36 L. R. A. 81; *Com. v. Moody*, 143 Mass. 177, 9 N. E. 511; *Kneffler v. Com.*, 94 Ky. 359, 22 S. W. 446. *James v. State*, 63 Md. 242, which is *contra*, was not only by a divided court, but the majority failed to unite in the same opinion, and the dissents by Chief Justice Alvey and Miller, J., vigorously and forcibly sustain the position taken by the cases above cited. *State v. Shaw*, 39 Minn. 155, 39 N. W. 305, determined that the blackboard scheme was not a gambling device, but also decided that the keepers of a poolroom could have been indicted at common law for keeping a gaming house. The fact that the proprietor not only kept the house, but took part in the betting, does not lessen his responsibility as keeper. He has not been prosecuted for the betting itself, but by becoming a party to the wager he did not relieve himself from punishment for maintaining the house.

Plaintiff in error, however, relies on the case of *Odell v. Atlanta*, 97 Ga. 670, 25 S. E. 173, where the proprietor of a "turf exchange" had procured a license to do "business on commission," and before the expiration of the year for which he had paid the city council of Atlanta attempted to prevent him from exercising the privilege which he claimed was conferred by the payment of the tax. This court held that the license was not a contract; that there was no State statute making such "occupation" or "business" penal; and that, being contrary to public policy, the city could, by municipal ordinance, prevent such a business from being carried on within its limits. But the ruling of the court must be confined to what it said. It was dealing with the legality of the "busi-

ness" and "occupation," and of the power of the city to prevent the continuance of such "business." The city had the right to break it up, whether the bookmaking was in a house, or whether the bookmaker made his book on the streets or by hunting up bettors in their own residence. Whether the proprietor was guilty of keeping a gaming house within the meaning of Pen. Code 1895, § 398, was not discussed by the court, nor is anything which was said as to a "business" conclusive in a different proceeding by the State prosecuting the proprietor of such a place for "keeping a gaming house."

Judgment affirmed. All the Justices concur.

OGLE v. STATE.

43 Tex. Crim. Rep. 219—96 Am. St. 860—63 S. W. Rep. 1009.

Decided June 22, 1901—Rehearing denied June 27, 1901.

GRAND JURY—VOID INDICTMENT—JEOPARDY: *A body of thirteen men is not a grand jury, and its proceedings are void—Void conviction no bar to future prosecution; nor for credit on second conviction.*

In June, 1883, defendant was convicted of murder in the second degree and sentenced to ninety-nine years' imprisonment; but after serving seventeen years was released on *habeas corpus*, because the body presenting the indictment, being composed of thirteen men instead of twelve, was not a lawful grand jury, and therefore the indictment was void. On April 27, 1901, a new indictment was presented by a legal grand jury for the same offense. On this indictment the accused was tried, found guilty, and his punishment assessed at five years in the penitentiary. *Held*, that the first proceeding being void, he is not in *jeopardy*, and it was no bar to the second indictment; nor was he entitled to credit for the time served under the first sentence.

Court of Criminal Appeals of Texas.

Appeal from District Court, Hill County; Hon. W. Poin-dexter, Judge.

S. W. Ogle, convicted of murder, appeals. Affirmed.

Ivy & Scruggs, A. W. Cunningham, and J. P. Word, for the appellant.

Wear, Morrow & Smithdeal, D. Derden, B. Y. Cummings, C. F. Greenwood, County Attorney, and Robt. A. John, Assistant Attorney General, for the State.

DAVIDSON, P. J. In 1883 appellant was convicted in Hill County of murder in the second degree, and his punishment assessed at 99 years in the penitentiary. On appeal that judgment was affirmed. During our recent Dallas term, application was made in his behalf for the writ of *habeas corpus* on the ground that the conviction was void, and the court trying him had no jurisdiction, because the indictment was presented by a grand jury consisting of 13 men. On the hearing of the writ, appellant was discharged from the penalty of the former conviction. *Ex parte Ogle*, 61 S. W. Rep. 122, 14 Am. Cr. Rep. 366. On April 27, 1901, a new indictment was preferred by a grand jury of Hill County. Upon this trial, appellant was again convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary. The latter indictment was in the usual form, and charged murder in the first as well as the second degree. Appellant pleaded in bar of murder in the first degree his acquittal of that degree under the former indictment, and his conviction of murder in the second degree, which, he says is also a bar to a prosecution for murder in the first degree in this case. He also pleaded conviction for murder in the second degree in bar of his trial for that offense under the present indictment, and, further, if his second plea was not well taken, then, under his previous conviction for 99 years, he had served something over 17 years of that time before being discharged, and asked, in case of his conviction for murder in the second degree under this indictment, that he be allowed that 17 years as a credit on whatever punishment the jury might assess in this case. The court sustained the demurrer to that portion of the plea which claimed a credit for the time served in the penitentiary under the previous conviction. The State replied to the pleas in bar, that the prior indictment was absolutely void; that the District Court of Hill County acquired no jurisdiction, and therefore the judgment was void.

Appellant relies upon *Mixon's Case*, 35 Tex. Cr. R. 458, 34 S. W. 290, in support of his plea of former acquittal of murder in the first degree. The case is not in point. In that

case the question of jurisdiction was not an issue. The indictment, though defective on its face, was returned by a legal grand jury. The jurisdiction of the court was not questioned. That case simply holds that an acquittal under an indictment defective on its face as to averments, will support the plea setting up that defense under the theory that it was an irregularity provided for by our statute and Bill of Rights. The particular clause of the Bill of Rights referred to provides: " * * Nor shall a person be again put upon trial for the same offense, after verdict of not guilty in a court of competent jurisdiction." Bill of Rights, Art. 1, § 14. Before a verdict of not guilty can be obtained, there must be a court of competent jurisdiction to try the case, and its jurisdiction must legally attach in order to authorize a trial. The jurisdiction in *Mixon's Case* had attached, but, the first indictment being defective, a new trial was awarded. On the subsequent trial, acquittal was pleaded in bar of those degrees of homicide of which the accused was acquitted on the first trial. This was ignored by the trial court, and on appeal held error. But this is not the question here presented. In that case there was jurisdiction. In this case there was not. The *Mixon Case* has reference to voidable judgments. This case presents the issues of the effect of a void judgment—one rendered by a court without jurisdiction of the cause it sought to try. We deem it unnecessary to enter into a discussion of judgments or proceedings which are voidable. That question is not involved here. The prior judgment in this case is not voidable, but void, and was set aside by this court by the procurement of appellant. Now, is the first indictment in this case void? The facts show it is, for it was returned by a grand jury composed of thirteen men. If void, then its presentment did not attach the jurisdiction of the District Court of Hill County. *Lott v. State*, 18 Tex. Crim. App. 627; *McNeese v. State*, 19 Tex. Crim. App. 49; *Smith v. State*, 19 Tex. Crim. App. 95; *Ex parte Swain*, 19 Tex. Crim. App. 323; *Rainey v. State*, 19 Tex. Crim. App. 479; *Wells v. State*, 21 Tex. Crim. App. 596; *Kennedy v. State*, 22 Tex. Crim. App. 693, 3 S. W. 480; *Mays v. State*, 36 Tex. Cr. R. 437, 37 S. W. 721; *Ex parte Ogle* (Dallas term, 1901) 61 S. W. 122. So far as we are aware, jurisdiction of the court trying the cause is an essential prerequisite where jeopardy is pleaded. "No

matter how far the proceedings may go, there is no jeopardy, unless the court has jurisdiction to try the offense." 17 Am. & Eng. Enc. Law, pp. 586, 587; *Wemyss v. Hopkins*, L. R. 10 Q. B. 378; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *U. S. v. Ball*, 163 U. S. 662, 16 Sup. Ct. 1192, 41 L. ed. 300; *Nicholson v. State*, 72 Ala. 176; *Bradley v. State*, 32 Ark. 722; *State v. Nichols*, 38 Ark. 550; *State v. Cheek*, 25 Ark. 206; *State v. Ward*, 48 Ark. 36, 2 S. W. Rep. 191, 3 Am. St. Rep. 213; *Harp v. State*, 59 Ark. 113, 26 S. W. Rep. 714. The same rule is laid down in California, Colorado, Georgia, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, Vermont, Virginia, Washington, and West Virginia. For collation of authorities from these States, see 17 Am. & Eng. Enc. Law, p. 587, note 1. The same rule obtains in this State. Id. "Where the grand jury finding the indictment is illegally organized, * * * the indictment is invalid, and consequently a trial based on it will not bar a subsequent prosecution for the same offense." Id. p. 588; *Finley v. State*, 61 Ala. 201; *Weston v. State*, 63 Ala. 155; *Brown v. State*, 10 Ark. 607; *Joy v. State*, 14 Ind. 139; *Kohlheimer v. State*, 39 Miss. 548. Speaking of the same subject, Mr. Bishop says: "When the grand jury is organized so imperfectly as not to be a lawful body, there is no valid indictment, therefore no jeopardy." Bi-sh. Cr. Law, § 1021, citing 39 Miss. 548; 61 Ala. 201; 63 Ala. 155. The *Kohlheimer Case*, 39 Miss. 548, is directly in point. The substance of that opinion is: "Where the indictment under which a party has been tried and convicted or acquitted is void on the face of the record, because of the illegal organization of the grand jury who found and returned it, such acquittal or conviction is not, either by the common law or the statute of this State, a bar to a subsequent prosecution for the same offense. It is otherwise where the indictment is merely voidable for matter *dehors* the record." In that case appellant had been tried under an indictment returned by an illegal grand jury, which sought to charge murder, but had been acquitted of the murder and found guilty of manslaughter. This acquittal was set up in bar of murder upon a second trial under a good indictment. Speaking of the constitutional inhibition that no person for the same offense shall be twice put

in jeopardy of life and liberty, the court said: "The same provision is contained in the Constitution of the United States, and the Constitutions of most, if not all, the States; and the decisions of the courts have constantly recognized the principle, under their written Constitutions, so fully established by the common law, that, 'if the indictment be so defective in form that a valid judgment could not be pronounced upon it against the defendant, he has not been in jeopardy, and, if acquitted, the acquittal would be no bar to another prosecution for the same offense.' (Citing many authorities.) It is further said by Mr. Bishop, upon the authority of many adjudged cases, 'that, if sentence be pronounced upon conviction, the defendant will be protected, while the judgment remains unreversed, not because he has ever been in jeopardy, but because of a general and very important principle of law, that an erroneous final judgment, rendered by a competent tribunal having jurisdiction over the subject-matter, is voidable only,' etc. But he further says in this connection: 'Where a man is brought before a tribunal that has no jurisdiction over the offense with which he is charged, or that has its existence by virtue of an unconstitutional act of the Legislature, or that is holding a term of court unauthorized by law, or that for any other reason has no authority to try him, he is not in jeopardy, however far such tribunal may proceed with the case. And in most, and probably all, of these circumstances the final judgment, when pronounced, is not "voidable," as mentioned in a previous section, but void, so that his conviction, unreversed, is no more a bar to another prosecution than his acquittal.' [That court cites many authorities in support of this proposition.] Mr. Wharton, in his American Criminal Law (section 541), says: 'A legal acquittal in any court of competent jurisdiction, if the indictment be good, will be sufficient to preclude any subsequent proceedings before every other court.' The court then makes this general proposition: "It seems to be clear, therefore, upon principle, as well as authority, that neither at common law nor by our Constitution will an acquittal or conviction (where the penalty has not been inflicted) upon a void proceeding or indictment operate as a bar to a subsequent indictment for the same offense. It cannot, therefore, be said that the defendant has been acquitted of the crime of murder by his conviction of manslaughter upon

an indictment which is pronounced in this proceeding to be void because not found by a competent grand jury, as appears by this record," etc. *Kohlheimer v. State*, 39 Miss. 548.

Our Bill of Rights (Article 1, § 14) provides: "No person for the same offense shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense after a verdict of not guilty in a court of competent jurisdiction." Article 5, § 13, of the Constitution requires: "Grand and petit juries in the District Court shall be composed of twelve men." When there are more than 12 men, what effect has it upon the indictment and the jurisdiction of the court? As far back as *Lott's Case*, 18 Tex. App. 627, a grand jury composed of more than twelve members has been held illegal, its acts nullities, and the indictment preferred by such grand jury void, and could not form the basis of a prosecution. In that case we find the following language: "We see from these provisions that a citizen can only be convicted and punished for a felony by the due course of the law of the land, and by authority of the indictment of a grand jury. The District Court can only acquire jurisdiction to hear and determine a felony case by an indictment of a grand jury. It has no more authority to hear and determine a felony case without an indictment of a grand jury thus presented than would a justice of the peace. No court in this State has such jurisdiction and authority. What constitutes a grand jury? Our Constitution answers the question plainly and emphatically. It says, 'Grand and petit juries in the District Courts shall be composed of twelve men, but nine members of a grand jury shall be a *quorum* to transact business and present bills.' There is no authority of law for a grand jury composed of any other number of men than twelve. Thirteen do not and cannot constitute a grand jury. If thirteen could be considered a grand jury, so could one, five, fifty or any other number that the fancy of the judge organizing the same might dictate. With respect to petit juries it is well settled that it must consist of the exact number prescribed by the Constitution. In *Stell v. State*, 14 Tex. Crim. App. 59, it is said: "The record must show that the jury was a legal one, and if it does not the error is a radical one, which will be considered on appeal, whether properly availed of in the court below or not, because "due course of the law of the land"

demands a legal conviction by a legal jury. If, then, a trial by jury composed of fewer or more than twelve, the constitutional number, be an infringement of the right of trial by jury, and not a trial by due course of the law of the land, for the same reason the action of a body of men fewer or more than twelve in number cannot be regarded as the action of a grand jury. Such a body of men is unknown to the law, and its acts, being wholly without authority of law, are absolutely null, and a pretended indictment preferred by such a body can have no legal standing or effect whatever. It cannot confer any jurisdiction of the case upon the court." To the same effect is *McNeese v. State*, 19 Tex. Crim. App. 40; *Smith v. State*, 19 Tex. Crim. App. 95; *Ex parte Swain*, 19 Tex. Crim. App. 323; *Rainey v. State*, 19 Tex. Crim. App. 479. In *Rainey's Case* we find this language: "This error does not appear to us to be a mere irregularity, but one of fundamental and vital importance, such as renders all proceedings, each and every step in the prosecution, void. * * * This objection is not to irregularity in forming, or to the personnel of, the grand jury. The objection that it was composed of thirteen men strikes deeper. It denies that such a body of men, under our Constitution, is a grand jury at all. * * * We therefore conclude that the Legislature, if disposed, has no power to invest the courts of this State with jurisdiction to try felony cases, save in the manner prescribed in the Constitution; that there is no power in the Legislature to give jurisdiction over felonies in direct violation of the Constitution, nor can the prisoner, either by mistake or unguardedly, confer jurisdiction on the courts to try and punish for felonies. He will not be permitted to sacrifice his life or liberty and entail infamy on his posterity; for this mighty Commonwealth has an interest in the lives, liberty and character of the citizen. * * * To compose a constitutional grand jury, the panel must be composed of twelve persons, neither more nor less. A greater or less number is not a grand jury. The number of persons of which the panel is composed is, in this State, a question of constitutional law; and no man can, by his consent, will, carelessness, or ignorance, constitute a grand jury to convict and punish for a felony. The party must be tried upon an indictment. What an indictment is, is a matter of law. It is the act of a grand jury. What constitutes a grand jury is a mat-

ter of law. Unless indicted by a grand jury, there is no jurisdiction in the court to try the defendant; and it will not be questioned that no man, either by his expressed consent, laches, or ignorance, can confer jurisdiction to try for a felony. The citizen cannot be put upon his defense on a charge of felony, or be convicted of crime, except in the exact mode prescribed by law, and a *fortiori* if prescribed by the Constitution." See, also, *Wells v. State*, 21 Tex. Crim. App. 596, 2 S. W. 806; *Harrell v. State*, 22 Tex. Crim. App. 693, 3 S. W. 480; *Ex parte Reynolds*, 35 Tex. Cr. R. 437, 34 S. W. 120. In the latter case it was said: "This court has held, and we see no reason for changing our opinion, that a body composed of more than twelve men is not a grand jury." The court cites with approval the former authorities, and proceeds as follows: "The District Court, in a felony case, does not obtain jurisdiction of the offense, unless by indictment. There must first be the act of a grand jury before the court's jurisdiction can attach in such cases. A prosecution for a felony without indictment by a grand jury is not due process of law. In this State there can be no indictment unless there was a grand jury. The verdict and judgment without indictment, in felony cases, are absolute nullities, and cannot be the basis or warrant for any commitment. * * * In this case the court's jurisdiction not having attached, the court therefore had no jurisdiction of the subject-matter. The conviction being without due process of law and in violation of the plain requirements of the Constitution, the warrant for the imprisonment of the applicant is therefore void, not voidable merely."

Then, if these authorities are correct—and we hold they are—the jurisdiction of the District Court cannot attach in felony cases until there has been an indictment preferred by a grand jury. The Constitution expressly provides that a grand jury shall consist of twelve men, and, having spoken thus emphatically, its mandate must be obeyed, and no other number of men than twelve can constitute a grand jury. Therefore the act of more than twelve men constituting a grand jury will be utterly void, and is not the basis of jurisdiction. Without jurisdiction the District Court cannot act in felony cases any more than could the justice of the peace or the County Court.

Looking to this question from an analogous constitutional

standpoint, we find that judges are disqualified under certain circumstances—among others, when they shall have been of counsel in the case. It has been universally held, so far as we are aware, wherever the record shows, that where the judge who tried the case has been of counsel, he is necessarily, by the language of the Constitution, disqualified and without authority to try the case, and the court therefore is without jurisdiction. It is held by an unbroken line of authorities that under such circumstances, the judgment is utterly void. *Abrams v. State*, 31 Tex. Cr. R. 449, 20 S. W. 987; *Graham v. State* (43 Texas Crim. Rep. 110), 63 S. W. 558. In *Abrams' Case*, *supra*, we find this language: "The judgment rendered by the court presided over by a disqualified judge is a nullity, and the case would remain undisposed of as completely as if the judge had not been present at the court." And in concluding the opinion it is said: "The trial was a nullity, the judgment void, and the cause stands upon the docket of the District Court as if the proceeding complained of in the record had not occurred"—citing *Newcome v. Light*, 58 Tex. 141, 44 Am. Rep. 604; *Chambers v. Hodges*, 23 Tex. 104; *Gains v. Barr*, 60 Tex. 676; *Lacy v. Barrett*, 75 Mo. 469; *Trerert v. Swift*, 19 Nev. 400, 13 Pac. 6; *People v. De La Guerra*, 24 Cal. 73; *In re White's Estate*, 37 Cal. 190; *Hall v. Thayer*, 105 Mass. 219, 7 Am. Rep. 513; *Converse v. McArthur*, 17 Barb. 410, 411; *Schoonmaker v. Uclearwater*, 41 Barb. 200; *Reams v. Kearns*, 5 Cold 217; *State v. Castleberry*, 23 Ala. 85; *Ochus v. Sheldon*, 12 Fla. 138; *Hibbard v. Odell*, 16 Wis. 633; *Moses v. Julian*, 45 N. H. 52, 84 Am. Dec. 114; *Foot v. Morgan*, 1 Hill 654; *Edwards v. Russell*, 21 Wend. 63 (*). This is true by reason of the constitutional inhibition against the judge sitting in a case in which he has been of counsel. This language is not any stronger than the guaranty of the Constitution, that no man shall be prosecuted for a felony, except upon the indictment of a grand jury. In *People v. Connor*, 142 N. Y. 130, 36 N. Y. 807, the question arose as to the effect of a trial and judgment presided over by a judge who was disqualified by reason of his relation to one of the parties to the suit. This language is

*In 43 Tex. C. R., these citations are given without names of cases, which the editor of 63 S. W. Rep. attempted to supply; but was misled from several mistakes in figures in 31 and 43 Tex. C. R. We have endeavored to make the citations full and correct. J. F. G.

found: "The trial proceeded, and proof of the relationship of the justice on the former trial to the defendant was made, the defendant's identity established, and all the proceedings on the first trial shown. The court instructed the jury that the plea of former conviction was not sustained unless there was in fact a lawful trial and conviction. That if the former trial was before a court, one of the members of which was related to the defendant within the prohibited degree, then the court was improperly constituted and without jurisdiction in the case, and so the result would be a mistrial, and no bar to another trial. The defendant's counsel excepted to these instructions, and the jury determined the issue upon the special plea in favor of the people." The Court of Appeals, passing upon that phase of the case, said: "There was no error in the charge or rulings of the court with respect to the effect of the former trial verdict. Section 46 of the Code applies to all trials, civil and criminal. The court before which the first trial was had was so constituted that it was without jurisdiction to try the particular case, and hence all proceedings before it in the case were absolutely void. In contemplation of law, there was no trial and no conviction. The trial and verdict were such only in form, without the power or jurisdiction to give any validity or legal effect whatever. When the verdict had been recorded, no legal result had been accomplished that had the slightest effect upon the rights or liberty of the defendant. It could not be said that he was once in jeopardy, within the legal and constitutional meaning of that term, since it implies a verdict or a trial before some court possessing jurisdiction."

We deem the reasoning in the line of cases with reference to the disqualification of judges analogous to that involved in the adjudication of this case. Both are constitutional inhibitions. Under all the authorities, so far as we have been able to ascertain, the judgment of a court rendered on an indictment preferred by an illegal grand jury, and a judgment rendered by a judge who is disqualified, are nullities; and the reasoning in both instances are placed upon the same proposition—that is, the court, under such circumstances, has no jurisdiction, and, having no jurisdiction, its judgments are nullities; there has been nothing tried, no more than if there had been no court at all. If this proposition is correct, and, under the authorities, it is unanswerable, the presentment of the first indictment into

the District Court of Hill County was a nullity; the jurisdiction of that court did not attach by reason of the pretended indictment; all of the proceedings had were nullities—as much so as if no indictment had been preferred, and no court in session. If this is not correct, it is by reason of the fact that an accused party can confer jurisdiction by consent to try a felony without the indictment preferred by a constitutional grand jury, and, having consented to such jurisdiction he waives all his rights that would attach otherwise. Appellant's plea of jeopardy, then, can only be sustained upon the theory that an indictment is not a prerequisite to a trial and conviction in a felony. If this is not true, then consent can and does confer jurisdiction. If consent can dispense with the indictment, it is by reason of this waiver on the part of the accused of the constitutional provision requiring the presentment of such indictment by a constitutional grand jury. If he can do this, then his conviction would be upheld whether the indictment was or not preferred, and, having thus consented, he could not afterwards question the conviction or any of its consequences. The judgment would not be void, and the writ of *habeas corpus* would not lie to relieve of the consequences of such conviction. If by consent, under such circumstances, jurisdiction should be conferred, and rights waived, then the long line of decisions in this State upon this question are of necessity erroneous, and must be overruled. Counsel for appellant would not maintain the proposition that the conviction was not void. Upon this he relied in the writ of *habeas corpus* which discharged him from the results of the first trial. If the indictment was not void, his first conviction was not illegal, and the whole matter was but an irregularity. We are of opinion that it was void, and that the indictment in the first case did not confer jurisdiction, nor did it constitute the court trying him one of competent jurisdiction within the meaning of the Constitution. We are not discussing the question of defective averments in an indictment, nor informalities or irregularities attendant upon a trial where the jurisdiction of the court has attached. This question lies back of that, because the court was not a court of competent jurisdiction, in that its jurisdiction has never attached. The reasoning in *Ex parte Degener*, 30 Tex. Crim. Rep. 566, 17 S. W. 1111, and *Ex parte Duncan* 42 Texas Crim. Rep. 661, 62 S. W. 758, is directly in point.

We are of opinion the court was correct in sustaining the demurrer to that portion of the plea which sets up the time endured under the first proceeding as a credit against the verdict to be rendered in this case. All the authorities we have found bearing on this question are adverse to appellant's contention. Partial payments do not apply to judgments imposing imprisonment, unless by the pardoning power in the commutation of time. The question of serving out full sentence is involved, and therefore discussed. The judgment is affirmed. Affirmed.

STATE EX REL. DURNER, SHERIFF, v. HUEGIN.

110 Wis. 189—85 N. W. Rep. 1046.

Decided April 30, 1901.

HABEAS CORPUS—CONSPIRACY—PRACTICE: Habeas Corpus *is a civil proceeding; it only reaches jurisdictional matters; but is proper remedy to review complaint and testimony in a preliminary examination—A preliminary examination is not an action; nor is its determination a final judgment—sufficiency of complaint and warrant—An order in a habeas corpus case is res adjudicata, until reversed; and when a sheriff is the respondent, he may employ private counsel, and may appeal—Common law and statutory conspiracy—General review of the subject, etc.*

1. Upon the review in this court of a case upon appeal or writ of error, a proper party to such appeal or writ is entitled to be heard by counsel regardless of whether that will, for the time being, recognize him as having a status which is one of the very matters to be decided on such review.
2. If in a *habeas corpus* suit against a sheriff, he is required to restore his prisoner to liberty, he is a party aggrieved within the rule that only such a party is entitled to be heard on appeal or review on writ of error.
3. The statutory and judicial policy which preclude a private attorney from appearing for the State in a criminal case in a trial or appellate court except by a special appointment for that purpose, do not apply to *habeas corpus* proceedings.
4. While an attorney cannot appear on the side of the State in a *habeas corpus* suit at public expense, he may appear by request of the proper officer at private expense, to represent the interests

- of the State, and he may appear regardless of such consent to represent the person charged with the wrong.
5. Regardless of what a *habeas corpus* proceeding should be called under the Code, which divides all judicial proceedings into actions and special proceedings, it is to all intents and purposes a civil suit—a proceeding in the nature of a civil action—in which the party seeking to establish his right to personal liberty is plaintiff within the meaning of section 2601, Rev. St. 1898, regardless of the name by which such a party is commonly known, and the person charged with the wrong is an adverse party to all intents and purposes a defendant, regardless of the name by which such a person is commonly known in such a proceeding.
 6. An order or judgment in a *habeas corpus* suit is *res adjudicata* as to the person charged with unlawfully restraining another of his liberty, till reversed in some proper proceeding.
 7. A necessary party to a judicial proceeding as a representative of public authority, having no interest in the litigation except to vindicate such authority, is a party in interest and may be a party aggrieved within the meaning of the appeal statute and the practice on review on writs of error.
 8. A warrant of commitment for trial which states the offense charged with convenient certainty is sufficient if good in all other respects.
 9. The formal language, "against the peace and dignity of the State of Wisconsin and the statutes in such case made and provided," or equivalent formal words, is unnecessary to either a criminal complaint or warrant of commitment for trial.
 10. The rule of convenient certainty as to describing the offense in a warrant of commitment does not require the facts to be stated in detail. A statement thereof according to their legal effect is sufficient.
 11. The description of an offense in a warrant of commitment by its generic name, if it has one, whether the offense be statutory or one known to the common law, states by reasonable inference all the facts requisite to such offense.
 12. The statutory form for a commitment found in section 4774, Rev. St. 1898, is satisfied by the use of language including all material elements, though such language depart from the particular wording of the form.
 13. The rule that a form prescribed by statute must be strictly followed, does not mean literally followed unless the statute clearly so indicates. That is not the case with section 4774, Rev. St. 1898.
 14. Upon proceedings before a committing magistrate being properly brought to the attention of the court for review in *habeas corpus* proceedings, the court has jurisdiction to examine into the sufficiency of the complaint to charge a criminal offense, and of the evidence as regards whether it will admit of a rea-

sonable inference of the existence of the ultimate facts necessary to hold the person charged for trial, i. e., that the offense was committed and that there is probable cause for believing the accused to be guilty thereof.

15. A *habeas corpus* suit reaches only jurisdictional error. It does not reach beyond the commitment to the proceedings leading up thereto where the person in custody is detained by virtue of the final judgment or order of a court having jurisdiction of the subject-matter and the person. But such is not the case where the person in custody is being held on a commitment for trial.
16. A preliminary examination is not an action. The determination thereof is not a final judgment. The proceeding is not according to the course of the common law; it is purely statutory, and compliance with the statute is requisite to jurisdiction at every step.
17. An examination to determine whether a criminal prosecution shall be commenced is a judicial proceeding in that, so far as the magistrate acts within his jurisdiction, his decision is as binding for the purposes of such proceeding when it is right as when it is wrong. But, like the situation where a board is authorized by statute to act in a *quasi-judicial* capacity upon evidence, if there is no evidence reasonably permitting of action, a decision upon a contrary theory is in excess of jurisdiction.
18. Where an examining magistrate acts upon evidence, and such evidence, looking at it from the most favorable standpoint, will not reasonably permit of such action, the error is jurisdictional, strictly so-called, remediable by writ of *habeas corpus*, within the rule that such errors only can be reached by such writ.
19. The doctrine that, where concert of action is necessary to an offense, a charge of criminal conspiracy does not lie, does not apply where the unlawful agreement is of itself an offense, but applies only where the agreement and the consummation thereof are so closely connected that the two constitute really but one offense, as in the case of the offense of adultery or that of bigamy.
20. Where concert is not a mere part of a criminal act, but is in aid of it and is itself criminal, the charge of conspiracy will lie against those concerting together to perpetrate such act, though only one of the parties, or neither one alone, could effect such purpose.
21. When a complaint charges the offense of conspiracy in the language of the statute, and a conspiracy to carry out the particular purpose of such conspiracy in a particular way is also charged, accompanied by a statement of overt acts pursuant to the conspiracy, the latter part may be rejected as surplusage in construing the complaint, but the two charges of conspiracy may be read together as charging a conspiracy of the nature indicated by the particular allegations as regards the method adopted for effecting the criminal purpose.

22. A complaint stating that three persons, naming them, concerted together, using substantially the language of the statute, for the purpose of maliciously injuring another in his business, describes the conspiracy made criminal by section 4466a, Rev. St. 1898.
23. An agreement between several independent concerns, each publishing a newspaper and furnishing thereby means for advertising, to compel a fourth person engaged in like business to reduce his rates for advertising or lose customers, indicates a malicious purpose to injure the business of the latter within the meaning of section 4466a, Rev. St. 1898.
24. If section 4466a be regarded as describing a conspiracy between owners of independent enterprises to control the rates charged in their line of work in any locality, great or small, it is not constitutional. However, it cannot be so regarded, for it makes the malicious purpose to injure an essential.
25. Several persons conducting independent business enterprises, may, in the absence of a statute, combine to control prices for the purpose of promoting their individual interests, and in their operations to that end impoverish a rival and drive him out of business, there being no malicious intent in their conduct, using the term in the sense of malice in law. Section 4466a does not go that far.
26. All agreements to maliciously injure another in any way are contrary to the policy of the law. Legislative authority is ample to outlaw such agreements to the extent of making the participants therein liable civilly and criminally.
27. A conspiracy to wrongfully injure another is actionable at the common law if executed to the damage of another, whether that other would have a remedy if the act were committed by a single person or not, or whether one person could commit such injury alone.
28. The doctrine that an act which is not actionable if done by one is not when done by many, is not the law of this State. Neither is the doctrine, as applied to a combination of persons to wrongfully injure another, that an act, lawful without malice, does not become unlawful by adding such element.
29. A combination of persons to injure another without any just cause, such as an injury that is not an incidental effect of the promotion of the legitimate interests of the members of the combine, is a conspiracy to inflict a malicious injury upon another at common law, and is such an injury under the statute (section 4466a, Rev. St. 1898) if it relates to such other's reputation, business, trade or profession.
30. A combination of individuals for the purpose of inflicting a malicious injury upon another, is in effect an agreement to injure by violence. It was the policy of the common law, as it is of the statute, to prevent such a wrong by civil and criminal liabilities.

31. The term "malicious injury," as used in the statute, is synonymous with that term in the law of conspiracy independent of the statute.
32. Section 4466a, Rev. St. 1898, is a mere declaration of the common law. Its only effect is, as to the particular matters stated therein, to remove the necessity for an overt act, which is required by the change of the common law of section 4568, *Id.* (Syllabus by Judge Marshall.)

Supreme Court of Wisconsin.

Error to Circuit Court Milwaukee County; Hon. Robert G. Siebecker, Judge.

Applications of Albert Hugin, Andrew J. Aikens, and Melvin A. Hoyt for release on *habeas corpus*. From orders discharging them on *habeas corpus*, the State, on the relation of George Durner, sheriff, brings error. Reversed.

Writ of error to the Circuit Court for Milwaukee County to review orders thereof, in *habeas corpus* proceedings, discharging certain persons from custody who were under restraint, according to forms of law, to await trial for the offense of conspiracy to injure. The complaint charging the offense was under oath and as follows:

"Lucius W. Nieman and Lloyd T. Boyd, of the city of Milwaukee, in said County of Milwaukee, being severally first duly sworn, complain to the police court for the City of Milwaukee, Milwaukee County, Wisconsin, that on or about the 5th day of April, A. D. 1900, at the city of Milwaukee, and within said County of Milwaukee, *Andrew J. Aikens, Albert Hugin* and *Melvin A. Hoyt*, did then and there unlawfully conspire, combine, confederate, associate, agree, mutually undertake and concert together for the purpose and with the intent then and there of willfully and maliciously injuring The Journal Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, in its trade and business, and for the purpose and with the intent then and there of willfully and maliciously injuring Lucius W. Nieman, Lloyd T. Boyd, and John W. Schaum, and each of them, in their trade, business and occupation; that the said The Journal Company at all of said times was, ever since has been and now is a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, as aforesaid, and at all of said times was and now is the owner and publisher of a daily newspaper and advertising medium known as The Milwaukee Journal, pub-

lished at the said city of Milwaukee, which said newspaper at all of the times herein referred to had, and now has, a large circulation as a newspaper and advertising medium in the city of Milwaukee, and throughout the State of Wisconsin and elsewhere; that it was at all of said times, and now is, the business and trade of said The Journal Company to publish said newspaper and to sell and furnish the same to its patrons and subscribers, and to solicit, receive, print and publish in said newspaper for hire advertisements for merchants and other persons, as is customary with such newspapers, and that at all of said times and especially at the time of the said combination and conspiracy, and subsequently thereto, the said The Journal Company had a large number of advertisers or patrons who advertised in said newspaper, The Milwaukee Journal, and that a large portion of the revenue of said The Journal Company was and is derived from such advertisements; that the said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum were at all of said times and now are, stockholders in said The Journal Company, and financially interested in the business and success of said The Journal Company; that the business and trade of the said Lucius W. Nieman is, among other things, that of editor of said The Milwaukee Journal, and the business and trade of said Lloyd T. Boyd is that of business manager of said The Journal Company and of the said The Milwaukee Journal; and that at all of said time the business of said John W. Schaum was and is that of treasurer of said The Journal Company.

"That the prices of advertisements and the advertising rates which newspapers such as said The Milwaukee Journal and the other newspapers herein mentioned are entitled to charge and which advertisers and patrons are willing to pay, depend and are based largely upon the circulation of such papers and the number of their readers; that early in the year A. D. 1900, said The Journal Company in good faith established a new rate for advertising in said The Milwaukee Journal, based, among other things, upon its increased circulation, and notified the patrons of and advertisers in the said The Milwaukee Journal thereof, which said rate for advertising was an increase of about 25 per cent. above that which was charged by said The Journal Company for like advertising in the year 1899.

"That at all of said times the said *Andrew J. Aikens* was, and

now is, the business manager of The Evening Wisconsin, a daily newspaper published in the city of Milwaukee, and having also an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto said The Milwaukee Journal; that at all of said times said Albert Huegin was, and now is, the business manager of The Milwaukee Sentinel, a daily newspaper published at the city of Milwaukee, having an extensive circulation and devoted to the purposes of a general newspaper and to advertising for hire, like unto the newspapers aforementioned; that at all of said times said *Melvin A. Hoyt* was, and now is, the editor of The Milwaukee Daily News, and the president of The News Publishing Company, the corporation owning said The Milwaukee Daily News, a daily newspaper published at the city of Milwaukee and devoted to the purposes of a general newspaper and to advertising for hire, like unto the other of said newspapers.

"That on or about said 5th day of April, A. D. 1900, the exact date whereof being unknown to affiants, said *Andrew J. Aikens*, *Albert Huegin* and *Melvin A. Hoyt*, with others unknown to affiant, in furtherance and in pursuance of said unlawful conspiracy, combination, confederation, association agreement and mutual understanding, for the purpose and with the intent then and there of willfully, maliciously and unlawfully injuring the said The Journal Company in its trade and business, and also said *Lucius W. Nieman*, *Lloyd T. Boyd* and *John W. Schaum*, and each of them, in their trade and business, and to that end and with the purpose and intent aforesaid, did confederate, agree and mutually undertake that if any merchant or other person or corporation advertising or proposing to advertise in said The Milwaukee Journal, should pay or agree to pay to said The Journal Company the increased rate for advertising established or fixed by it as aforesaid, that then and in that case any such person or corporation should not be permitted to advertise in any of said other three newspapers, to-wit: said The Milwaukee Sentinel, The Evening Wisconsin, and The Milwaukee Daily News, unless such merchant, other person or corporation should advertise in each of said three papers and pay to each of them or to the respective owners or proprietors of them, a corresponding increase over the rates respectively theretofore charged by such other three newspapers respectively, to-wit: about 25 per cent. in excess of what said last-mentioned

three papers respectively were then charging and had theretofore charged for advertising; but that in case any merchant, other person or corporation should refuse to pay to said The Journal Company the said increased rate established by it as aforesaid for advertising in said The Milwaukee Journal, then and, in that case such merchant or other person or corporation so refusing should be at liberty to advertise in any or all of the other of said three newspapers at the rates which had theretofore been charged by said other three newspapers respectively; that a large number of merchants in the city of Milwaukee and other persons were at the time of said combination and agreement, and subsequently thereto, advertising in all of said newspapers, to-wit: The Milwaukee Journal, The Evening Wisconsin, The Milwaukee Sentinel and The Milwaukee Daily News, and that the right or privilege to advertise in two or more of said papers was and is considered and regarded by a large number of such merchants and other persons as a valuable right and privilege and one much to be desired; that all or the greater part of the patrons of and persons advertising in said The Milwaukee Journal were, pursuant to said combination and conspiracy on the part of said *Aikens*, *Huegin* and *Hoyt*, and in furtherance thereof, notified by them of the said agreement, conspiracy and combination between said *Andrew J. Aikens*, *Albert Huegin* and *Melvin A. Hoyt*; that many of the patrons and advertisers in said The Milwaukee Journal were induced thereby to withdraw their advertisements therefrom, greatly to the injury of the business and trade of said The Journal Company and of said *Lucius W. Nieman*, *Lloyd T. Boyd* and *John W. Schaum*; that pursuant to said combination, agreement, confederation and conspiracy, and in furtherance thereof, said *Andrew J. Aikens*, *Albert Huegin* and *Melvin A. Hoyt*, did refuse to allow the advertisements of divers merchants and other persons to be inserted in either The Milwaukee Sentinel, The Evening Wisconsin or The Milwaukee Daily News aforesaid, and did prevent the advertisements of divers merchants and other persons from appearing in all or any of said three last-mentioned newspapers because such merchants or other persons so prevented had paid or had agreed to pay to said The Journal Company the said increased rate for advertising established by it as aforesaid; and that by reason of said combination, conspiracy and agreement many merchants in the city of Mil-

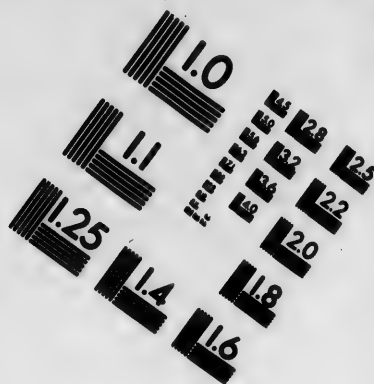
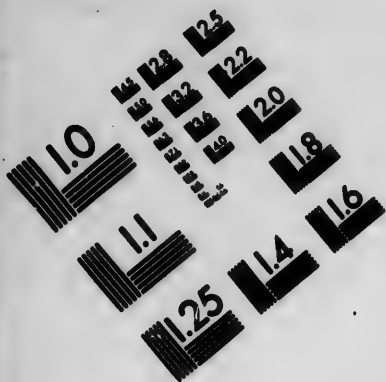
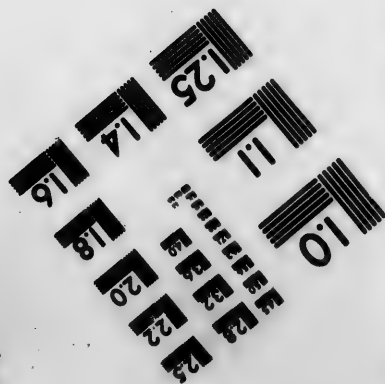
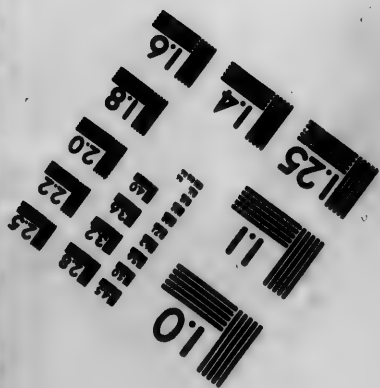
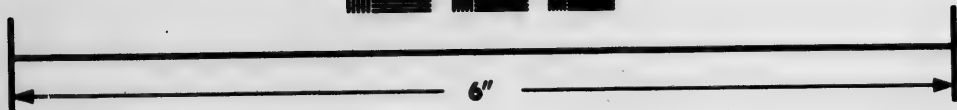
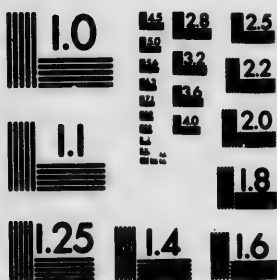


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waukeee and elsewhere, and other persons, were prevented from advertising in said The Milwaukee Journal, greatly to the injury of the business and trade of said The Journal Company, and of said Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum, and of each of them, contrary to the statute in such case made and provided, and against the peace and dignity of the State of Wisconsin.

"Wherefore, affiants pray that the said *Andrew J. Aikens*, *Albert Huegin* and *Melvin A. Hoyt* be arrested and dealt with according to law."

The complaint was filed with the police court in the city of Milwaukee and such proceedings were thereupon had, based thereon, that the defendants therein named were arrested and produced before such court for a preliminary examination, whereupon a motion was made for their discharge upon the ground that the allegations of the complaint were not sufficient to show that a criminal offense had been committed. The motion was overruled. Thereupon evidence was taken before the court, tending to establish the allegations of the complaint. At the close of the evidence a motion was made to discharge each of the defendants, which was denied. The court then decided upon the evidence that the offense charged in the complaint had been committed, and that there was probable cause for believing the defendants guilty of such offense. Each defendant refused to give bail for his appearance before the Municipal Court of Milwaukee County for trial, whereupon he was duly committed to the custody of the sheriff of such county to await such trial. A commitment was delivered to the sheriff, as to each defendant, all being in the same form. The following is one of such commitments:

"In the Police Court of the City of Milwaukee.

"State of Wisconsin, Milwaukee County—ss.

"*The State of Wisconsin to the Sheriff, or his Deputy, or to any Constable or Policeman, and to the Keeper of the Common Jail of said County:*

"Whereas, *Albert Huegin* has this day been brought before the police court of said city, charged on the oath of Lucius W. Nieman and Lloyd T. Boyd with having on or about the fifth day of April A. D. 1900, at the city and County of Milwaukee, committed the offense of conspiracy to injure.

"And whereas, an examination of the said *Albert Huegin* has been held before said court, and the said court being satisfied that an offense has been committed as charged in said complaint, and that there is probable cause to believe the prisoner guilty thereof, whereupon the said court did require the said *Albert Huegin* to recognize with sufficient sureties in the sum of five hundred (\$500.00) dollars, for his appearance before the Municipal Court of said county, at the present term thereof, for the year 1900, and not depart said court without leave. And the said *Albert Huegin* having failed to recognize in due form of law.

"Now, therefore, in the name of the State of Wisconsin, you are hereby commanded forthwith to convey and deliver into the custody of the said keeper of the common jail the body of the said *Albert Huegin* and you, the said keeper, are commanded to receive the said *Albert Huegin* into your custody, in the said jail, and him there safely keep until he shall recognize as aforesaid or shall otherwise be discharged by due course of law.

"Witness, the Honorable Neele B. Neelen, justice of the police court of said city of Milwaukee, this 30th day of June, in the year of our Lord one thousand nine hundred."

Thereafter each defendant, on a petition stating the proceedings to which reference has been made, sued out of the Circuit Court for Milwaukee County a writ of *habeas corpus* to test the legality of his detention. The sheriff of the county made due return to each of such writs, justifying the detention by the commitment placed in his hands as before stated.

Albert Huegin, one of the defendants, traversing the return of the sheriff, alleged that the proceedings upon which his detention was based were illegal and void and beyond the jurisdiction of the committing magistrate for the reasons set forth in his petition for the writ. Such reasons were, in substance, that the complaint failed to state facts sufficient to constitute a criminal offense. *Melvin A. Hoyt*, another of the persons in custody, demurred to the return to his writ, for insufficiency. *Andrew J. Aikens* interposed a traverse similar to that of defendant *Huegin*. On the hearing on behalf of defendants *Huegin* and *Aikens*, and in support of their pleas to the return of the sheriff, the evidence and proceedings had in the police court were offered and received in evidence. The commitments were also offered and received in evidence. The District Attorney then

moved the court that James G. Flanders and William H. Austin, attorneys of the court, be allowed to appear as counsel for the sheriff. The motion was denied upon the ground that *habeas corpus* proceedings are criminal in character, or involve an inquiry into a criminal proceeding, and that the duty devolves solely upon the District Attorney to represent the State, the real party, in such a matter, the sheriff not being a party to the proceeding at all.

The court then decided that the proceedings which resulted in the several commitments were illegal, because the facts alleged in the complaint did not constitute a criminal offense; that the statute under which the prosecution was commenced covers only cases where the purpose of the combination is to do such an injury that an action at law can be maintained for damages against the members of the combination, in case its purpose is carried out. An order was accordingly entered to discharge each of the defendants from custody. Such orders are presented here for review by writs of error, as before stated.

After returns were filed to the writs of error issued out of this court, a motion was made on behalf of the sheriff of Milwaukee County for leave to be heard by private counsel, which motion was opposed by the defendants in error.

E. R. Wicks, Attorney General, *Howard Van Wick*, District Attorney, *A. C. Umbreit*, Assistant District Attorney, *Winkler*, *Flanders*, *Smith*, *Bottom & Vilas*, and *W. H. Austin*, for the plaintiff in error.

Van Dyke, *Van Dyke & Carter*, for the defendant in error Huegin.

W. H. Timlin, for the defendant in error Aikins.

N. S. Murphy, for the defendant in error Hoyt.

MARSHALL, J. (after stating the facts). Because of the long delay in announcing the decision in this case it is deemed proper to say, as a justification therefor, that the number and importance of the questions involved were such that the case seemed to call for the most careful study by each member of the court which the amplest opportunity therefor would permit, and to require that a decision should be rendered only when it could embody the best judgment of each such member, if that result could be reached within such time as not, by reason of the

delay, to materially prejudice the administration of justice. There is room for congratulation that the purpose of the long deliberation upon the case has been accomplished. To circumstances which were unavoidable, preventing that full discharge of official duty, as regards individual study of the case, which was desired prior to settling upon the final conclusions, the delay must be in the main attributed. The questions legitimately discussed by counsel are so numerous that in the preparation of the opinion a choice had to be made between stating mere conclusions with appropriate supporting authorities, or discussing such questions at length. By the former method a brief opinion would have sufficed to cover the case; by the latter a lengthy opinion was unavoidable. The former course would have required but little labor compared with the latter, but it seemed that the careful preparation of the case and presentation of it by numerous and able counsel for the respective parties could not be adequately responded to, so as to fairly indicate the appreciation felt here for the assistance received from such preparation and presentation, otherwise than by a pretty full discussion of each of the points decided which counsel upon either side deemed of sufficient importance to require them to present for that purpose. Acting upon that conviction we will discuss each of such points with sufficient fullness to satisfy all reasonable expectations and endeavor to make the conclusions reached a definite declaration of the law, so that, in addition to adjudicating the rights of the parties to the suit, the result will be valuable as regards each point presented, in guiding the courts and the profession in this State in future cases.

Opposition to the motion on behalf of the relator to be heard in this court by private counsel in his behalf, was based on the following grounds: (1) It involves consideration of one of the errors claimed to have been committed by the court below which should only take place upon the consideration of the other errors. (2) The Attorney General is required by section 163, Rev. St. 1898, to appear for the State and prosecute or defend all proceedings in the Supreme Court, in which the State is interested or a party, and that precludes appearance by private counsel in criminal proceedings, the law being the same as to the Attorney General in the Supreme Court as it is as to the District Attorney in the Circuit Court. (3) The sheriff

is not a party and has no personal interest in the result of the review of the proceedings called in question by the writs of error. Each of such propositions involves an important question of practice, which is regulated either by statute or by the judicial policy of the State, and has received consideration resulting in the following conclusions:

1. If the sheriff of Milwaukee County by whom the State sued out the writ of error, is a party to the proceedings in this court and in any event is entitled to be heard as such, he cannot be denied that right because to allow it would be inconsistent with a ruling of the court below, sought to be reviewed by the writ of error. If he is properly here as a party, obviously, his rights as such cannot be jeopardized by any decision made by the court below which is a subject for review on the writ of error. That seems too clear for reasonable controversy. If counsel's position be correct, no person denied the right to be heard in a trial court upon the ground that he is not interested in the controversy, can be heard on appeal from the decision except there be a judgment for costs against him, because recognition here to present his case would be a recognition of his claim that he was a party to the proceeding in the trial court. We cannot sanction that doctrine. The sheriff was the actor in suing out the writ of error. He appears at the bar of the court and asks to be heard by counsel. If he is a party to the proceeding he must be heard regardless of any incidental bearing the decision may have upon any question involved in the review of the proceedings upon the writ. Manifestly, if he was a party in interest in the *habeas corpus* proceedings, he is a party to the suit commenced in this court by the writ of error to review the result thereof, if he was bound thereby to his injury, to some appreciable degree, either directly and immediately or so that direct injury of some sort may probably come to him therefrom; in short, if he is "a party aggrieved." Our appeal statute on that point (section 3048, Rev. St. 1898) is no broader at most than the common-law rules governing the subject of parties in suits commenced by writs of error, or section 3043, *Id.* A writ of error lies in favor of him "who is a party to the record;" a man who "is aggrieved by an error in the foundation, proceeding, judgment or execution, in suit," said Justice Grier, in *Bayard v. Lombard*, 9 How. 530, 13 L. Ed. 245, quoting from early common-law writers. See, also, 7 Enc. Pl. & Prac.

p. 856. That the relator here is a party aggrieved within the rule stated it seems is quite clear, but we will refer to the subject more at length in the discussion of the third proposition.

2. The second proposition assumes that proceedings to test the right of a person to his personal liberty are criminal in character and governed by the rule declared in *Biemel v. State*, 71 Wis. 444, 37 N. W. 244, *State v. Duff*, 83 Wis. 291, 53 N. W. 446, and other cases. Whether *habeas corpus* proceedings are in their nature civil or criminal we do not deem necessarily material. If the decision were to turn on that question, though, as at present advised, it would result in favor of the proposition that the remedy by *habeas corpus* is a civil remedy, as contended by the relator. The writ *ad faciendum, subjiciendum, et recipiendum* of the common law was the sole legal remedy of a person wrongfully restrained of his liberty. The purpose of a proceeding instituted by it was not to punish for the wrongful act of restraining him of his liberty, nor did it concern, necessarily, the wrongful act causing his detention. It was confined to compelling the immediate human instrument of the unlawful restraint to restore his victim to liberty, notwithstanding any charge made against him. The case cited to our attention by relator's counsel, *Ex parte Tom Tong*, 108 U. S. 556, 2 Sup. Ct. 871, 27 L. Ed. 826, opinion by Waite, C. J., states briefly and clearly the true nature of such proceedings, as they are uniformly regarded in the books: "The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right of liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process." In a later case, *Cross v. Burke*, 146 U. S. 82, 13 Sup. Ct. 22, 36 L. Ed. 896, the court, speaking by Fuller, C. J., said:

"It is well settled that a proceeding in *habeas corpus* is a civil and not a criminal proceeding." So the authorities in this state that it is the policy of the written law that no one but the public prosecutor or his assistant duly appointed shall be permitted to represent the Commonwealth in criminal cases against the accused, do not extend to a civil action or proceeding in the nature of a civil suit commenced by the issuance of a writ of *habeas corpus*, because, if for no other reason, it is not a criminal suit. The law that makes it the duty of the District Attorney of a county to appear and prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county wherein the State is interested or a party, except for assault and battery (section 752, Rev. St. 1898), precludes legal services being rendered by way of assisting the District Attorney in a civil matter at public expense. That has often been decided. *McDonald v. Milwaukee Co.*, 41 Wis. 642; *Board of Supervisors of Manitowoc County v. Sullivan*, 51 Wis. 115, 8 N. W. 12; *Cutts v. Rock Co.*, 58 Wis. 642, 17 N. W. 636; *State v. Duff*, 83 Wis. 291, 53 N. W. 446; *Frederick v. Douglas Co.*, 96 Wis. 411, 71 N. W. 798. But it has nowhere been decided that the State's Attorney, either of the county or the State at large, cannot obtain or receive assistance at his own expense or the expense of others in a civil proceeding. In *McDonald v. Milwaukee Co.*, *supra*, the sheriff employed counsel to defend against proceedings commenced by writ of *habeas corpus*. He made a claim against the county for his disbursements for such services. The claim was held invalid, because of the duty of the District Attorney of the county to attend to such matters as a part of his official duties, made so by section 3433, Rev. St. 1898, which provides that when it appears from the return to a writ of *habeas corpus* that the person seeking to obtain his liberty is detained upon a criminal accusation, no order shall be made for his discharge until opportunity shall be given to the District Attorney of the county to be heard, if to be found within the county; and because such provision is exclusive of the right of the sheriff to employ counsel at public expense. The case must be read in the light of what was under consideration, that is, the right of the sheriff to employ counsel at public expense. There is nothing in that to militate against a person other than the District Attorney standing in court as the representative of the people in a civil action by consent of

the public attorney. No judicial policy with which we are familiar is thereby violated, nor any constitutional right. Such a representative cannot claim compensation for his services except as against the individual employing him. That is as far as the decisions of this court go. No reason is perceived why a reputable attorney in a mere civil action cannot be heard in court on behalf of the State by permission of the officer whose duty it is to stand responsible for the due protection of the public interests, without the violation of any right secured by the Constitution or any law, to the person standing in the capacity of an adversary to the public in the proceedings. It has been the universal practice in this State to permit private counsel in this particular class of cases, as is abundantly shown by the decisions cited by counsel for the relator. *In re Booth*, 3 Wis. 1; *In re Falvey*, 7 Wis. 630; *In re Pierce*, 44 Wis. 411; *In re Eldred*, 46 Wis. 530, 1 N. W. 175; *State v. Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776; *State v. Ryan*, 70 Wis. 676, 36 N. W. 823; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 290.

3. What has been said goes upon the theory that the State is the only party interested in *habeas corpus* proceedings adversely to the petitioner, when the person alleged to be wrongfully restrained of his liberty is detained upon a criminal charge; but, as indicated in the brief discussion of the first proposition, we cannot agree with the learned counsel for defendants in error that the respondent in such a proceeding is not a party thereto. The issuance of a writ of *habeas corpus* is to all intents and purposes the commencement of a civil action, not an action strictly so-called, within the meaning of section 2629, Rev. Stat. 1898, to be commenced by the issue of a formal summons, but in the same sense that proceedings to enforce the remedy by *mandamus* and proceedings by writ of error are civil suits, as has been repeatedly held. The issuance of the writ is the commencement of a proceeding in a court of justice for the enforcement or protection of a right within the meaning of section 2595, *Id.* In *Ex parte Tom Tong*, *supra*, the issuance of the writ of *habeas corpus* was denominated the commencement of a suit to enforce a civil right. That was said in the same sense that this court declared in *Paine v. Chase*, 14 Wis. 653, that the issuance of a writ of error is the commencement of an original suit and regarded as the commencement of an action

and in the same sense that it was said, in *State v. Jennings*, 5 Wis. 113, 14 N. W. 28, that a proceeding by *mandamus* is essentially a suit. True, the issuance of either of the writs mentioned, as before indicated, is not the commencement of an action strictly so-called within the meaning of the Code, because it is there declared that all remedies in courts of justice are divided into actions and special proceedings (section 2591 Rev. St. 1898) and that a civil action shall be commenced by the service of a summons (section 2629, *Id.*). But the grant of power to Circuit Courts to issue writs of *habeas corpus* and *mandamus*, among other common-law writs, contemplated their use for the purposes they were devoted to before the adoption of the Code, *i. e.*, for the commencement of suits within the broad meaning of the term; and their essential character in that regard has not been and cannot be changed by any legislative enactment. Whether the issuance of such a writ be called by the Code the commencement of a civil action or a special proceeding, it is to all intents and purposes the commencement of a suit and the final determination thereof is a final judgment in a suit or proceeding in the nature of a civil action. In *Holmes v. Jennison*, 14 Pet. 540, 564, 10 L. Ed. 591, Chief Justice Taney said: "If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty." The court further said, in effect, that the term "proceedings in a suit" and the term "proceedings in an action" are synonymous; that when a law confers, in general terms, jurisdiction upon an appellate court to review on writ of error the final judgment in any suit, it includes jurisdiction to review the final determination in *habeas corpus* proceedings.

It follows from what has been said that the *habeas corpus* proceedings in question must be regarded as a civil action—an ordinary proceeding in a court of justice to enforce a personal right—within the meaning of section 2595, Rev. St. 1898, which says that such a proceeding is an action. That is in harmony with the decisions of this court to the effect that, without any statutory regulations, a writ of error lies to review a final determination on *habeas corpus* (*State v. Smith*, 65 Wis. 93, 26 N. W. 258), and with *State v. Kemp*, 17 Wis. 669, and cases which followed it, denying to the State the use of the writ of error in criminal cases. That rule was one of judicial policy

only, in a field where it was supposed the court was free to establish the law for this State, and has been abrogated by statute (section 3043, Rev. St. 1898). This was the suit of the defendants in error and their only adequate remedy to vindicate their right of personal liberty. The immediate instrument of the wrong complained of was the sheriff of Milwaukee County. The petitioners for the writ sought to establish their right to personal freedom notwithstanding the commitment under which the sheriff justified his conduct. They were, to all intents and purposes, plaintiffs, within the meaning of section 2601, *Id.*, regardless of the name by which such parties are commonly known. The adverse party on the record was the sheriff. He was to all intents and purposes the defendant in the proceeding, regardless of the name by which such a party is commonly known. The statute (section 2595, *Id.*) says: "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right," and unless the State is the plaintiff and the proceeding is against the defendant for the punishment of a criminal offense, it is a civil action, and every person necessary to a complete determination of the controversy as against the plaintiff is a necessary party and interested defendant. Section 2603, *Id.* The term "party to a suit (or action)" applies as properly to persons seeking, by writ of *habeas corpus*, to vindicate their right to personal freedom, and to the adverse party who is restraining them of it, as to contestants upon the record in any other suit. The former are persons seeking to establish their legal rights; the latter, persons on whom it is sought to impose an immediate duty or liability to recognize such rights. 15 Enc. Pl. & Prac. p. 463.

Upon the District Attorney was imposed the duty of guarding the interest of the State, but he had no duty to perform by virtue of his office for the sheriff as an individual. The latter was a party, and an interested party, because he was charged with being guilty of the particular wrong which it was the purpose of the writ to redress; hence the law must be construed as according to him the same right as to any other party to be heard by counsel. True, as counsel for defendant in error say, section 3436, Rev. St. 1898, protected the sheriff from any liability for obeying the order discharging, or directing a dis-

charge of the prisoners, but there is no statute protecting him from liability for the wrongful imprisonment.

We are not unmindful that there are decisions to the effect that an adjudication in *habeas corpus* proceedings is not binding in a subsequent suit to vindicate the same right between the parties, or a suit between such parties where the same question is material. *In re Quinn*, 2 App. Div. 103, 37 N. Y. Supp. 534; *People v. Brady*, 56 N. Y. 182; *Hurd*, *Habeas Corpus*, § 386. That doctrine was based on a supposed common-law rule that a decision on *habeas corpus* is not subject to review on appeal or writ of error. Such doctrine has been modified by judicial policy in many jurisdictions and in others displaced by statute, as it has been in this State, so far as it before prevailed here. *Church*, *Hab. Corp.* (2d ed.) p. 577; *Ex parte Cuddy* (C. C.) 40 Fed. 62; *Perry v. McLendon*, 62 Ga. 598; *Ex parte Jilz*, 64 Mo. 205. Section 3437, Rev. St. 1898, which is the same as the Missouri statute that governed *Ex parte Jilz*, expressly changed the common-law rule as regards the effect of a final determination of a *habeas corpus* proceeding. It expressly prohibits the commencement of a second *habeas corpus* proceeding for the same cause, while the determination in the first remains unreversed. That, and the remedy for a review of such a final determination by writ of error sued out by either party to the writ, which is given by our statute (section 3043, *Id.*), effectually changed the common-law rule, so that the doctrine of *res adjudicata* has now the same applicability to *habeas corpus* proceedings as to other suits.

We have not overlooked the suggestion that the doctrine that ruled *McCarty v. Board*, 61 Wis. 1, 20 N. W. 654; *People v. Lawrence*, 107 N. Y. 607, 15 N. E. 187, and *Bryant v. Thompson*, 128 N. Y. 427, 28 N. E. 522, and some other cases, applies to the status of a person defending against the charge in *habeas corpus* proceedings of unlawfully restraining another of his liberty. That doctrine is that a person or tribunal, exercising judicial functions between parties, is not a party to a proceeding to challenge a decision made by him so that he may himself take an appeal or be a party to an appeal involving such decision. In *McCarty v. Board*, a decision of the Board of Supervisors had been reversed on writ of *certiorari* and the Board attempted to appeal. In *People v. Lawrence* a judge whose decision of a matter had been reversed on *certiorari* attempted to

appeal. The mere statement of the circumstances under which courts have applied the doctrine referred to is sufficient to show that it has no application here. If the court that heard the *habeas corpus* proceedings or the examining magistrate were here claiming to be a party to the writ of error, and demanding an opportunity to be heard, the cases cited by counsel would be in point. It has been repeatedly held that a person or body not acting in a judicial capacity, but a party to a judicial proceeding as a representative of the public, even though having no pecuniary interest in the litigation, has an appealable interest in a judgment adverse to his or their authority. *State v. Wolfrom*, 25 Wis. 468; *Moede v. County of Stearns*, 43 Minn. 312, 45 N. W. 435; *People v. Jones*, 110 N. Y. 507, 18 N. E. 432.

What has been said, it seems, covers every suggestion that has been made why the sheriff of Milwaukee County was not entitled to be heard by counsel in the Circuit Court in the *habeas corpus* proceedings and why he is not entitled to be heard in this court as a party to the writ of error. He was and is a party in every sense of the word, and is, so far as concerns himself, entitled to be heard by counsel of his own choosing.

The first question on the merits is, does the warrant of commitment state any offense known to the laws of this State? That involves an inquiry into whether a statement of the facts—necessary to the jurisdiction of the offense, if there be one, and in substance that the person named in the commitment on a particular day named, was brought before the court charged on oath with committing the offense of conspiring to injure, and that such court, from the examination had, was satisfied that the offense charged had been committed and that there was reasonable ground to believe such person guilty thereof—shows an adequate cause for holding such person for trial. Defendants in error claim that it does not, because it fails to show, in detail, the existence of the facts necessary to constitute the offense of conspiring to injure, with some approach at least to the technical accuracy of an indictment at common law, so as to identify the alleged wrongful conduct with either the common-law offense of conspiracy or the offense stated in section 4466a. Rev. St. 1898. Counsel do not state the rule of certainty, which they contend the commitment should be tested by, in the exact language we have used, but it seems from their

reasoning that what has been said fairly expresses their contention. They say the warrant was fatally defective because it did not show with whom the person named therein conspired, nor the fact that there was more than one guilty participant so as to make a combination possible; that it failed to state the facts constituting the offense; that it omitted to recite that the alleged combination was entered into for the purpose of willfully or maliciously injuring another; that it did not literally follow the statute; and that it did not conclude in the form of the statute in such case made and provided.

We do not understand that any such degree of certainty in a commitment as that contended for is required. Authorities may be found here and there tending to support counsel's contention; for example, *Ex parte Branigan*, 19 Cal. 133, cited to our attention, which is contrary to later decisions made by that court and out of harmony with the current of authority, as we shall show. The general rule is that it is sufficient, in a commitment for trial, to state with reasonable clearness the nature of the offense with which the person is charged, and conclusions of fact in general language, justifying his detention on such charge; that a statement of the specific facts in detail, on which the charge is based, is unnecessary. A multitude of authorities to that effect might be cited, commencing with the older books and coming down to date. In *Collins v. Brackett*, 34 Minn. 339, 25 N. W. 708, the offense charged was one created by statute. The particular section was not referred to, nor were the facts essential to the offense stated in detail; but there was sufficient in the commitment to clearly indicate the kind of offense for which the accused was held to answer, and sufficient to indicate by reasonable inference the statute creating the offense. The court said that it satisfied the rule of convenient certainty by which such instruments are to be tested; that it pointed by reasonable inference to the statute creating the offense, and therefore, by reasonable inference, stated everything necessary to the offense which was not specifically set out. "It is not necessary," said the court, "in such an instrument, to set forth the facts constituting the offense particularly. * * * It is impossible to construe the commitment as referring to any other than the statutory offense. While it does not set forth every ingredient in such offense, it contains specifications enough to indicate the general nature of the crime charged, and

that is sufficient." In *State v. Everett*, Dud. (S. C.) 295, a case often referred to by courts and text writers, the commitment under consideration merely described the offense as the crime of larceny, no fact being stated essential to that offense; yet it was held, on *habeas corpus*, that the commitment was sufficiently certain to justify the officer in detaining the prisoner; that it is a great mistake to suppose that such a warrant need enumerate any fact or circumstance accompanying the offense, the nature of which is set forth therein; that it is sufficient to merely state the offense with convenient certainty; that it should not be for felony generally, but that the instrument should indicate the special nature of the felony. That decision is in harmony with the authorities generally, though directly contrary to *Ex parte Branigan*, *supra*, which supports counsel's views as we have before indicated. All the cases cited, it will be found, declare for the rule of convenient certainty merely. But while the California case regards that degree, as it seems, to call for certainty to a certain intent in particular, it is obvious that convenient certainty is satisfied where language is used which, by reasonable inference, points with reasonable clearness to the particular subject intended to be expressed. The doctrine which we say generally prevails was followed in later California cases. *Ex parte Moan*, 65 Cal. 216, 3 Pac. 644; *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657. True, reference is there made to a form for commitment prescribed by statute, which is however substantially identical with the one which, it is said in section 4774, Rev. St. 1898, may be used. The California court, in the early case, while reaching a conclusion directly opposite to that declared in *Collins v. Brackett*, *supra*, and the cases to which we will presently refer, referred to the same authorities for support, i. e., 1 Chit. Cr. Law, 109, and 2 Hale, P. C. 122. A careful reading of those authorities discloses the fact that what is said about the higher degree of certainty is merely advisory. When it comes to the necessities of the case the lower rule is stated with many illustrations: For example, quoting from 1 Chit. Cr. Law, 111:

"It is necessary to set forth the particular species of crime * * * with convenient certainty. * * * If the commitment be for felony it ought not to be generally for felony, but it must contain the special nature of the felony briefly, as

for felony of the death of J. S. or for burglary in breaking the house of J. S., etc. But though it was formerly thought otherwise, it appears now to be settled, that a commitment for high treason, or suspicion of treason generally, or for treasonable practices, without stating any overt act or other particulars of the crime is sufficient. And * * * there are precedents of commitment for felony in general in good authors, without stating the specific accusation. So in *Wilkes' Case*, 2 Wils. 153-159, a commitment for publishing 'a most infamous and seditious libel entitled "The North Britons, Number 45," tending to inflame the minds and alienate the affection of the people from his majesty, and to excite them to traitorous insurrections against the government,' was held sufficient, though it was urged that the libel ought to have been set forth in order that the court, on a *habeas corpus*, might be able to fix the *quantum* of bail. So it has been held that a commitment which charged the party generally with insulting justices of the peace in the execution of their office, without stating what he said or did, is sufficient. It is, however, in general advisable to describe the offense concisely but in substance as an indictment."

There is obviously a wide difference between what is advisable and what is necessary in such cases. It would be a mistake to adjudicate rights upon the basis of what is merely advisable, losing sight of the necessities of the case. We cite the following additional authorities sustaining the view expressed: *Ex parte Howard*, 26 Vt. 205; *People v. Johnson*, 110 N. Y. 134, 17 N. E. 684; *Ex parte Willoughby*, 14 Nev. 451; *People v. Gray*, 67 How. Prac. 456; *State v. Killelt*, 2 Bailey, 289; *In re Kelly* (C. C.) 46 Fed. 653; 4 Enc. Pl. & Prac. pp. 577, 578, and cases cited.

It follows from what has been said that if the general statement in the commitment in its literal sense or by reasonable inference, points clearly to the offense intended to be charged, and such offense, so called, is one in fact, for which an accused person can properly be held, the commitment was a complete defense to the *habeas corpus* suit till overturned by some defect of a jurisdictional nature in the proceedings upon which it was based, unless it was fatally defective by reason of the statute (section 4774, Rev. St. 1898). As we have seen, the description of an offense well known to the law, by its generic name, as the offense of arson, burglary, larceny or murder, by reason-

able inference indicates the existence of all the essentials of the offense. That is just as true of a mere statutory offense when it has a name which individualizes it and points with reasonable certainty to the statute on the subject. *In re Kelly*, *Collins v. Brackett*, and *People v. Johnson*, *supra*, fully cover that question. Applying that rule to the commitment in question, no difficulty whatever is perceived. It says the accused was charged with having committed, on a day named, the offense of conspiring to injure. The use of the term "conspiring" suggests without possibility of doubt that two or more persons were concerned in the offense. The only law in this State making a mere agreement between two persons to do an act injurious to another under any circumstances an offense is section 4466a. Rev. St. 1898. Therefore the language, "the offense of conspiring to injure," with reasonable clearness refers to such statute. It includes by inference, a statement of all the facts necessary to satisfy the calls of the statute. The statement of the name of the crime states with convenient certainty the nature thereof and of course suggests the existence of facts necessary thereto. The general statement includes the details, if such general statement is sufficient to suggest them with reasonable clearness. A commitment so drawn as to satisfy the degree of certainty thus indicated is sufficiently precise to satisfy every part of it and is according to the prevailing rule on the subject.

The idea advanced by counsel that the commitment is fatally defective for want of the preliminary words, "against the form of the statute in that case made and provided," can hardly be considered as being seriously urged. There was a time when substance in judicial proceedings was in some respects sacrificed to mere form, or when mere form was considered to be as essential as substance; but in the progress of events the law has developed to a point so far away from such notions that they are regarded as obsolete. So long as the commitment shows that the accused was held for trial for a criminal offense, the unavoidable inference is that the act charged took place, if at all, contrary to law. Any mere formal statement of that, as a concluding phrase in the commitment, was wholly unnecessary. This court, in *Nichols v. State*, 35 Wis. 308, characterized a useless expression, similar to the one in question, as a mere rhetorical flourish, adding nothing to the substance of the instrument, and as wholly unnecessary in the absence of a constitutional or statu-

tory mandate making it so. That was affirmed in *Murphy v. State*, 108 Wis. 111, 83 N. W. 1112. There is no such mandate in the way as to the matter under consideration.

A suggestion is made by one of the learned counsel that the commitment is void because it does not follow strictly the form prescribed by statute, and another says there is no statutory commitment for such a case. The first suggestion will be considered without deciding that the officer in this case was required to use the particular form referred to. Section 4740, Rev. St. 1898, requires a warrant to contain the substance of the complaint on which it is issued, and section 4774, *Id.*, prescribes a form of commitment for trial that "may be used," which indicates that the offense should be stated "as in the warrant." The rule is that where a form is prescribed by statute it must be strictly followed. That has been held to mean, followed with almost technical accuracy where the language of the statute so indicates. *Keniston v. Chesley*, 52 N. H. 564. But section 4774 does not so indicate, unless we read "may" as "must" or "shall" and give thereto its full meaning down to immaterial details. Nothing of the kind, we think, was intended. *Streeter v. Frank*, 3 Pin. 386, did not go that far. It dealt with a material omission from a statutory form. Section 4774 is open to a reasonable construction, requiring only that the form be followed strictly as to the substance of things, not literally. There is a difference between following a form literally and following it strictly. The former goes to minuteness of detail in mere matters of form, while the latter may be satisfied by the essential elements. In *Streeter v. Frank* one of those elements was omitted. The words in the form under discussion "state the offense as in the warrant," taken in connection with the requirement that the warrant shall recite the substance of the complaint, mean no more than that it shall state the same offense as the one named in the complaint with sufficient accuracy that its identity will appear with convenient certainty. What has been said on another branch of the case as to such degree need not be repeated. The complaint charged in general language, or attempted to do so, and also by all the particulars, the commission of the offense to injure, going further in such particular than the specific offense as created or declared in section 4466a, though it is plain that such statute was what the complainant had in mind. The substance of the

complaint was that the accused were guilty of having committed, on a day named, the offense of conspiring to injure, and that was substantially carried into the commitments.

If we were to hold that the commitments do not show with convenient certainty, within the rules above stated, that the defendants in error were imprisoned to wait their trial upon a charge of having violated section 4466a Rev. St. 1898, the Circuit Court none the less erred in discharging them—if the complaint upon which they were arrested charged an offense known to the law, and the record of the examination which the court had properly brought to its attention showed that there was evidence tending to support the charge on these two essentials: First, that the offense was committed; second, that there was probable cause for believing that the accused were guilty thereof—regardless of whether the decision of those questions, or either of them, by the committing magistrate, was right or wrong. That was substantially the rule at common law, and it was preserved by the constitutional grant of power to Circuit Courts to issue writs of *habeas corpus*, especially since there is no statute in any way restricting the jurisdiction of such courts in that regard. So far as the statutes of this State treat the subject they confirm and broaden the common-law rule. Express provision is made for bringing to the notice of the court, in a *habeas corpus* suit to vindicate the right of a prisoner detained for trial upon a criminal charge to his personal liberty, the record of the examination including the evidence taken, and it is made his duty to examine such evidence, and, if thereby it appear to him that the accused is guilty of the offense, to commit him for trial or admit him to bail regardless of any irregularity in the original commitment. Section 3429 Rev. St. 1898; *State v. Bloom*, 17 Wis. 521. It is also the duty of the court on *habeas corpus* to examine the complaint, and discharge the prisoner if it does not state an offense known to the law; and to examine the evidence and treat the decision of the examining magistrate as outside of his jurisdiction if no competent evidence is found upon which such magistrate could properly have acted. That is well settled by the authorities. Church. Hab. Corp § 231, § 236; *In re Wadge*, 21 Blatchf. 300, 16 Fed. 332; *In re Luis Oteiza v. Cortes*, 136 U. S. 330, 10 Sup. Ct. 1031, 34 L. Ed. 464; *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146;

Ex parte Bollman, 4 Cranch, 75, 125, 2 L. Ed. 554. Whatever conflict apparently exists on this question in the books will be found on careful examination not to be a conflict in fact, but is explainable by reference to statutory regulations. We have no statutory regulations in conflict therewith, but, on the contrary, the statutes of this State substantially declare the common-law rule. True, at common law the writ of *habeas corpus* reached only *jurisdictional* defects; but, as the term is rightly understood, it goes further than counsel for plaintiffs in error seem to concede. Some courts use the term in the restricted sense of jurisdiction of the person and of the subject-matter, while others, and those it is believed holding the correct doctrine, extend it to include excess of jurisdiction, treating a decision—other than one upon the trial of an issue—that a complaint is sufficient when it does not state any offense known to the law, or one that the essential facts exist warranting the commitment of a person for a trial on a criminal charge, where there is no competent evidence for the judgment of an examining magistrate to reasonably act upon, as on the same basis as any other jurisdictional defect in the proceeding. That was early declared as the common-law doctrine and the one to be followed where there is no statute affecting the subject otherwise. *Ex parte Bollman*, *supra*, Chief Justice Marshall there said, after recognizing the distinction between imprisonment upon a final judgment and detention under a commitment to stand trial:

"It is unimportant whether the commitment be regular in point of form or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done." Page 114, 4 Cranch, and page 567, 2 L. Ed. "This having been a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held for trial. * * * 'If,' says a very learned and accurate commentator, 'upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail.'" Pages 124, 125, 4 Cranch, and page 570, 2 L. Ed.

That declaration has always been adhered to by the Federal

Courts and followed generally by all courts where jurisdiction in *habeas corpus* proceedings, or the practice therein, is not otherwise regulated by statute.

There is no need to go further to demonstrate that the common-law office of the writ of *habeas corpus*, as it came to us and has been preserved by our State Constitution, is as indicated by the decision referred to. While it is true that such writ never takes the place of a writ of error, and is confined to jurisdictional defects, when it is resorted to merely for the purpose of liberating a person detained in custody to await his trial on a charge of being guilty of a criminal offense, the questions of whether there was any evidence for the magistrate to act upon and whether the complaint charges any offense known to the law are jurisdictional matters. The reviewing court, in the exercise of its function, must necessarily pass upon and reverse or affirm the decision of the committing magistrate, if such matters are properly presented for its consideration, according to its determination thereof, and in doing so it does not go beyond jurisdictional defects. It can examine the evidence only sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. It cannot go beyond that and weigh the evidence. It can say whether the complaint will admit of a construction charging a criminal offense, or whether the evidence rendered the charge against the prisoner within reasonable probabilities. That is all. When it has discovered that there was competent evidence for the judicial mind of the examining magistrate to act upon in determining the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act, upon evidence worthy of consideration in any aspect, is as well within his jurisdiction when he decides wrong as when he decides right.

Counsel for plaintiff in error cite to our attention a large number of cases to support their contention that the Circuit Court had no jurisdiction to review the evidence, many of which are cases decided by this court. We have taken time to examine each of such cases and are unable to discover that they furnish any support for counsel's position. For example, *Ex parte Jones* (C. C.) 96 Fed. 200, one of the significant cases

referred to, states the rule in the *syllabus*, which is fully borne out by the opinion, thus:

"The sufficiency of the evidence on which an accused was committed by a magistrate is not open to review in a proceeding by *habeas corpus*, but where although, there was evidence of the commission of the offense, there was no competent evidence even tending to incriminate the person charged, he should be discharged on *habeas corpus*." The concluding language of the opinion is as follows: "It is true that there was evidence before the commissioner tending to show that the offense charged had been committed by some one, but a careful examination discloses no legal evidence on which the commissioner could exercise his judgment in holding the petitioner for trial. An order will be made discharging the petitioner." The decisions of this court cited, in the main, refer to the scope of the jurisdiction of a court in reviewing the final judgment of another court upon writ of *certiorari* or *habeas corpus*. Manifestly, they do not touch the question here under discussion. Neither a writ of *certiorari* to review a final judgment of a court upon a trial, nor a writ of *habeas corpus* for that purpose, reaches the evidence. That is undoubtedly true. No common-law rule is better settled than that, while the contrary is just as well settled as regards the functions of a writ of *habeas corpus* in testing the legality of a commitment for trial for a criminal offense.

True, as counsel say, the expression has often been used by this court that upon *habeas corpus* proceedings only jurisdictional errors can be considered, and that has been used without qualification and in a way to indicate—to a person who has not in mind the distinction between jurisdiction for the trial and determination of a cause, and jurisdiction to hold a judicial inquiry to determine whether a prosecution shall be instituted—that insufficiency of evidence, no matter how great, cannot be considered, because, the court having jurisdiction of the subject-matter and the person, a decision upon insufficient evidence or without any evidence is judicial or mere error, not jurisdictional error. What the court said in each one of the cases referred to was correctly said as applied to the case. The follows are some of the cases: *In re Milburn*, 59 Wis. 34, 17 N. W. 965; *Wright v. Wright*, 74 Wis. 439, 43 N. W. 145; *In re Graham*, 76 Wis. 366, 44 N. W. 1105; *In re Rosenberg*,

90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *In re Mcgegett*, 105 Wis. 291, 81 N. W. 419; *In re Pikulik*, 81 Wis. 158, 51 N. W. 261; *In re French*, 81 Wis. 597, 51 N. W. 960; *In re Eckhart* 85 Wis. 681, 56 N. W. 375. They all follow the well-known rule that where there is jurisdiction to try and determine an issue, there is jurisdiction to commit error to the extent of deciding the ultimate fact involved without competent evidence to support it, and that the error can only be corrected upon writ of error or appeal where one is allowed; that the writ of *habeas corpus* or writ of *certiorari* cannot reach the mischief. But a proceeding before an examining magistrate is not a judicial trial. It is a mere judicial inquiry, as before indicated, for the purpose of determining whether an offense has been committed and there is a probability that the accused is guilty thereof and should be placed on trial therefor. No plea or issue is necessary. No jury is demandable or proper. The doctrine of *res adjudicata* does not apply so that the result of one inquiry will preclude another. It is a proceeding that was unknown to the common law—a mere statutory creation, a personal privilege which the accused must be accorded unless he waives it. Being statutory and special, evidence tending to establish the facts justifying a commitment or holding to bail for trial, is jurisdictional the same as any other statutory essential. The statute awarding the privilege provides that the examining magistrate shall act, in determining the facts, upon evidence; and that contemplates that there must be evidence, and competent evidence, tending to establish the facts. It is jurisdictional in the same sense that the production of some competent evidence before a *quasi* judicial body, authorized by statute to act only upon evidence, is jurisdictional. The rule in such cases is that a clear violation of law in doing those things that are within the scope of the power of the officer or body to do is jurisdictional error. *State v. Whitford*, 54 Wis. 150, 11 N. W. 424; *State v. Dodge Co.*, 56 Wis. 79, 13 N. W. 680; *State v. Lawler*, 103 Wis. 460, 79 N. W. 777. For further authorities to support the views here expressed, see *Church, Hab. Corp.* §§ 237-247; *People v. Martin*, 1 Parker, Cr. R. 187; *In re Snell*, 31 Minn. 110, 16 N. W. 692; *In re Hardigan*, 57 Vt. 100; *In re Simon* (Sup.) 13 N. Y. Supp. 399; *State v. Hayden*, 35 Minn. 283, 28 N. W. 659; *People v. New York Catholic Protectory*, 106 N. Y.

604, 13 N. E. 435; *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9; *Ex parte Willoughby*, 14 Nev. 451; *Jones v. Darnall*, 103 Ind. 569, 2 N. E. 229.

Some writers who have favored the profession with textbooks in recent years, speak of this doctrine as a departure from the common law, through a failure to distinguish between a judicial determination according to the course of the common law and a mere statutory proceeding which, though judicial, is not final in any sense, and is not an action, but a proceeding preliminary to an action. The misconception referred to is very marked in the work of an able writer who cites *State v. Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, to support a suggestion that this court has not departed from the general rule as to the review of judgments on *habeas corpus* in the treatment of the scope of the writ as regards reaching behind the determination of an examining magistrate. That case did not deal with anything but the general rule that only jurisdictional defects can be reviewed on *habeas corpus*, and the one that a *de facto* judicial officer or body has the same jurisdiction as any other as regards collateral attack. The case is in harmony with the idea that some evidence is necessary to preclude successful collateral attack upon an examining magistrate's conclusion because that is a statutory requisite thereto.

Independently of the common-law rule it has been repeatedly held, in States having statutes similar to ours, that they contemplate the examination of the proceedings before the committing magistrate, where properly brought to the attention of the court on *habeas corpus* proceedings, so far as necessary to determine whether the magistrate acted upon competent evidence tending to establish the facts; and also the introduction of new evidence on issue joined as provided. *People v. New York Catholic Protectory*, *supra*; *People v. Richardson*, 18 How. Prac. 92; *In re Henry*, 13 Misc. Rep. 734, 35 N. Y. Supp. 210; *People v. Tompkins*, 1 Parker, Cr. R. 224. In the report of *People v. Martin*, *supra*, there is a full review of American and English authorities, and as a result it is said, reading from the syllabus:

"In criminal cases where an indictment has been found, the court, upon *habeas corpus*, cannot go behind the indictment because there are no means of ascertaining upon what it was

found. But on a commitment before indictment the whole question of guilt or innocence is open for examination on the return to the writ of *habeas corpus*, and the inquiry is not necessarily confined to an examination of the original depositions. In such cases, under our Revised Statutes, the proceedings on *habeas corpus* are in the nature of an appeal from the decision of the committing magistrate." It is not to be understood by that language that the court held that, on such appeal, so-called, the court could go further in reviewing the decision of the committing magistrate on the evidence on which he acted than to determine whether it furnished some reasonable ground for a decision. Church, in his work on *Habeas Corpus*, expresses the view that such statutes as those in New York and in this State are mere declarations of the common law. He is borne out by the holdings of the New York court, but we need not discuss that subject here. It is quite clear, though, that chapter 147, Rev. St. 1898, was intended to cover the entire field of practice in *habeas corpus* suits, so far as relates to original proceedings. The scope of section 3425, *Id.*, is broad enough, if a statute was required on that question, to enable the petitioner for writ of *habeas corpus*, by his petition, to bring to the attention of the court all the proceedings before the committing magistrate or by presenting the same as evidence in support of his answer to the return, where such answer contains allegations rendering such proof competent. Section 3427, *Id.*, precludes examination into the proceedings upon which the determination of the court was had in committing the person, only when such detention is upon a final judgment or order. That manifestly does not include a determination of a mere judicial inquiry. Section 3429, *Id.*, refers to the former section and contemplates the examination of evidence produced before the examining magistrate where it is properly brought to the attention of the court.

Sufficient has been said to demonstrate that counsel for plaintiff in error have confused the scope of a *habeas corpus* suit calling in question the validity of a final judgment or order and the scope thereof as to reaching the proceedings of a committing magistrate. It is not understood, it seems, that failure to comply with the statute requiring such magistrate, in his inquiry, to act upon evidence, is not an error committed in acting within his jurisdiction as is the act of entering a

judgment, by a court, upon the trial of an issue, without competent evidence to warrant it—but is error in going beyond his jurisdiction. The general rule invoked by counsel is as claimed, but the application of it contended for is wrong.

The point made by counsel for plaintiff in error that the Circuit Court erred in going beyond the warrant of commitment and examining the complaint, and that it would have been error to have taken into consideration the evidence taken before the committing magistrate, which was properly produced as part of the *habeas corpus* proceedings, cannot be sustained. The position of counsel for defendants in error, that the question of whether the complaint states any crime known to the law, and that of whether there was any evidence tending to show the facts essential to the detention of the accused for trial upon the charge, were open, is approved.

The doctrine is invoked by the learned counsel for defendant in error *Melvin A. Hoyt*, that "where concert of action is necessary to the offense, conspiracy does not lie." That principle is familiar, but its application, as its language clearly indicates, is necessarily confined within very narrow limits. It does not reach a situation where mere combination to effect an objection is itself criminal and not merged in a crime of higher degree, else the absurd result would follow that the offense of conspiracy would be impossible either at common law or under the statute. The rule applies where the immediate effect of the consummation of the act in view, which is the gist of the offense, reaches only the participants therein, and is in such close connection with a major wrong as to be inseparable from it, as for instance, in the offense of adultery, or bigamy, or incest, or dueling. That illustration, in a different way, is given at section 1339, Whart. Cr. Law, which is cited to our attention and relied upon by counsel, but which, as it seems, is wholly misunderstood in urging it upon the attention of the court as applicable to the facts of this case. Where an act is an offense, as that of adultery, a crime, it cannot be made a different offense because of the circumstance that in the conception of it a precedent agreement by two persons is necessary; but if the act is preceded by an agreement between several persons to cause the offense to be committed by others, or between a member of the combination and a person outside of it, the gist of the precedent concurrence

is the wrongful agreement; that of the object thereof is the adulterous act. In the latter there is the element of *concursum necessarius*—the concurrence in the ultimate act constituting the crime, precluding its being prosecuted as the crime of conspiracy. In the former there is also the element of *concursum necessarius* in that at least two persons are necessary to a combination or agreement. But there is also the element of *concursum facultativum*, making it a distinct offense. Those concerting to cause the crime to be committed may be prosecuted for the offense of conspiracy, and those guilty of the act the combination was formed to bring about may be prosecuted for that, though the effect thereof be to prosecute one of the parties for both offenses. In the latter the plurality of agents, really, as Mr. Wharton says, in effect, is in aid of the conception to commit the ultimate act of adultery. In the former the plurality of agents is as necessary to the full conception of the offense so as to preclude the possibility of failure thereof, as to the consummation of the offense itself. In the one, concert is essential to the act and a necessary part of it; in the other, concert, itself an offense, is a mere aid to the act which is the ultimate purpose thereof—a purpose that is susceptible of being abetted without, though not as effectually as with, the specific, independent act of combination. It is only where the concurrence to commit an offense and the consummated act are so connected that they really constitute one act, every element inculpatory of each party, so that separation of the whole into its constituent elements and a prosecution for it as a distinct offense would place the parties twice in jeopardy, that the rule applies.

Shannon v. Com., 14 Pa. 226, and *Miles v. State*, 58 Ala. 390, cited by counsel to sustain his view, are in harmony with what has been said. In the first case cited the rule is stated thus: "Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act." That is, as applied to this case, if the mere infliction of an injury to The Journal Company in its business was a criminal act, and obviously it was not such, the infliction thereof by two persons acting in concert and by mental concurrence could not be prosecuted as a conspiracy. But, as said in *Shannon v. Com.*, where an act is an integral offense and not an integral part of one, a guilty participant may be prosecuted for both. The

term "act" as there used manifestly refers to an act which is illegal in the sense that it is wrong, tested by the rules of good morals. In this case the sole offense, if any is charged, is the combination of several persons willfully and maliciously to injure The Journal Company in its business. There is no room whatever for saying that the prosecution for that offense would result in the separation of it from another and greater offense, as in the case where persons guilty of the crime of adultery were attempted to be prosecuted for a conspiracy to commit that offense. The fact that it would not be practicable or even possible in such a situation for one person alone to commit the act, i. e., of injuring the business of The Journal Company, which is the alleged object of the combination, does not militate against the prosecution of all the parties to the combination as guilty of the crime of conspiring to willfully and maliciously injure The Journal Company in its business. Counsel admits that there is a dearth of authority to support the application contended for, of the principle under discussion. He failed to cite to the attention of this court any that meet the situation when fairly analyzed, while the explanation of the rule we have given, showing that it has no application to the prosecution under discussion, is supported by ample authority, as it is by reason and common sense. We cite the following: *U. S. v. Stevens* (D. C.) 44 Fed. 132; *U. S. v. Boyden*, 1 Low. 266, Fed. Cas. No. 14,632; *Reg. v. Boulton*, 12 Cox. Cr. Cas. 87; *U. S. v. Rindskopf*, 6 Biss. 259, Fed. Cas. No. 16,165; *U. S. v. Bayer*, 4 Dill. 407, Fed. Cas. No. 14,547; *State v. Sprague*, 4 R. I. 257; *Ochs v. People*, 124 Ill. 399, 426, 16 N. E. 662; *Reg. v. Whitchurch*, 24 L. R. Q. B. 420; *U. S. v. Martin*, 4 Cliff. 156, Fed. Cas. No. 15,728; *Reg. v. Rowlands*, 5 Cox, Cr. Cas. 466. In *Reg. v. Whitchurch*, a woman conspired with others to administer drugs to herself or by some other means to cause her to abort a child with which she was pregnant, and it was held that all the parties concerned in the combination could be prosecuted for the offense of conspiracy. Lord Coleridge, C. J., in delivering the opinion of the court, said: "I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offense was intended to be committed could not, if she stood alone, be guilty of the offense." In *U. S. v. Bayer* the

facts were these: Under the statutes of the United States on the subject of bankruptcy there was an offense that could be committed only by the bankrupt. Such person and others colluded together to facilitate the commission of the offense by him. All were prosecuted for the offense of conspiracy and the prosecution was sustained. Dillon, J., in delivering the opinion of the court, said, in the main: "Conspiracy to commit a crime is of itself criminal at common law. The fact that one of the conspirators could not himself commit the intended offense neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it." In that situation the conspiracy and the consummated act are different offenses, in the sense at least that the fact that the offense has been committed is no legal bar to a prosecution for the conspiracy. In *Ochs v. People, supra*, it was said that it is not essential to a conspiracy that the object thereof be possible. We will not further discuss this question. It is not improbable that more has been already said than is warranted in its proper solution. We confess that when it was first suggested on the oral argument it hardly seemed to be worthy of serious attention or that the learned counsel so supposed. But an examination of the full discussion of the subject in counsel's brief satisfies us we were at least in error as to the state of his mind, and we have treated it accordingly and put all the labor upon it which the gravity thereof would call for if there were a reasonable doubt, before a study of the subject, as to whether the case might turn upon its solution.

We have now considered, we believe, all the important contentions and suggestions advanced by counsel for the respective parties, which from any point of view could stand in the way of an examination of the complaint and the evidence, assuming, without intending to decide, as yet, that section 4466a, Rev. St. 1898, is a valid provision of law. It has been seen that the commitment, on its face, justified the sheriff in holding the defendants in error to await their trial for a violation of such section, and that it was competent for the Circuit Court, in the *habeas corpus* suit, the proceedings before the examining magistrate having been duly presented for consideration, to go behind the commitment and determine whether the complaint, by any reasonable construction, stated an offense within the meaning of such statute, and whether there was any

evidence tending to establish the two essentials for holding the accused for trial, i. e., that the offense charged had been committed and that there was probable cause to believe the accused guilty thereof. Sufficient has also been said to show that the general language of the complaint, standing alone, to the effect that the accused did, on a day and at a place named—which satisfied the requisites of the statute to that extent—concert together with intent maliciously to injure The Journal Company and the other persons named, in their trade and business, sufficiently charged the doing of those acts made an offense by the statute. That such general language substantially follows section 4466a, and that such section is the only statute making a conspiracy without an overt act a criminal offense, is not questioned. It follows that the complaint must be construed with reference to such statute, and be held to satisfy it unless the general language thereof is connected with allegations which take therefrom some essential element.

At this point we meet the claim of counsel for defendants in error that the statement of the particulars of the alleged wrongful agreement, and of the acts done pursuant thereto, explains the meaning of the general charge and in that way renders the complaint insufficient. To that, answer is made by counsel for plaintiff in error that the allegations as to acts done pursuant to the conspiracy were unnecessary, the offense being complete as soon as the agreement was made to commit the malicious injury, therefore, that such allegations should be rejected as surplusage. That is undoubtedly a correct rule, but no reason is perceived why the statement of the particulars of the agreement can be rejected. It is plain that, while the complaint states generally an agreement to maliciously injure the persons named in their trade and business, in the terms of the statute, and then states that the members of the unlawful combination, pursuant to their unlawful purpose, agreed to do certain specific acts mentioned, the real purpose of the complainant was to state but one offense—not an unlawful conspiracy to injure generally, the persons named in their business and also an unlawful conspiracy to injure them in such business in a particular way. The facts were stated first according to their legal effect and second in detail. That is the only reasonable construction of the complaint. It should

be read as if the language were to the effect that the accused maliciously conspired together to maliciously injure the persons named in their business, in that they agreed and concerted together, in manner and form as stated in the statute, to maliciously injure such persons by doing the particular things alleged. That was the conclusion reached by the circuit judge. He disposed of the case at that point on a supposed insufficiency of the complaint. If he had gone further and examined the evidence the result would not have been different; for that only tended to establish the truth of the complaint. Viewed in the light of the particular allegations as to the nature of the combination the evidence, for that purpose, was ample to give the examining magistrate jurisdiction to pass upon the truth of such allegations to the extent necessary to hold the accused to trial.

At this time it seems necessary to restate the charge contained in the complaint as we have construed it. Upon that turn the remaining questions to be considered.

According to the complaint it was in substance agreed between the defendants in error *Melvin A. Hoyt*, representing The Daily News, *Albert Huegin*, representing The Milwaukee Sentinel, and *Andrew J. Aikens*, representing the Evening Wisconsin—each controlling the columns of the paper with which he was connected, each paper being a daily newspaper published in the city of Milwaukee and a medium for advertising business in the same field occupied by The Journal Company, the publisher of a newspaper called The Milwaukee Journal, also a medium for advertising business—that whereas the latter had raised its rates 25 per cent above those customarily charged for such service by it and the proprietors of the other papers named, if any person agreed to pay or paid The Journal Company its increased rates for advertising in its paper, he should not have the privilege of advertising in any of the other newspapers unless he should advertise in all of them at such increased rates; but that any person who should decline to pay The Journal Company said increased rates for advertising in its paper should have the privilege of advertising in any or all of the other papers at the old rate. Now, it is said there is nothing in that from which a reasonable inference of the malicious purpose called for by

the statute can arise; that such intent means bad intent to injure another in the sense of committing an actionable injury, while the terms of the agreement indicate only a purpose on the part of those concerned in it to promote their own interests regardless of those of their competitor. The malice of the statute is evidently malice in law, not necessarily ill will or malice in fact. It means, as is commonly said, a wrongful act done intentionally without just cause or excuse. The statute does not deal with things corporeal, as the person or property of another, but with his reputation, trade, business or profession. If we can see in the agreement, by reasonable inference, the independent purpose to harm The Journal Company in its business of furnishing to the trade facilities for advertising, that is sufficient as regards the element of malice. There seems to be no difficulty about that. The principle that every one is presumed to intend the natural and probable consequences of his voluntary acts suggests at once, upon looking at the agreement, that the primary, if not sole end in view was to force The Journal Company to reduce its advertising rates to the old standard or cause it to lose custom, either of which alternatives would result in pecuniary loss to it and one of them in the destruction of the freedom of action every one is entitled to enjoy in the conduct of his business, without turning any pecuniary or other legitimate gain to its competitors. If the agreement contemplated that any legitimate benefit, under any circumstances, would flow to the participants therein or the concerns they represented, by compelling The Journal Company to reduce its rates for advertising, the ground for it is not disclosed by the transaction as stated, and it is one of those mysteries of a special calling that persons outside thereof cannot comprehend. How could any material benefit have been expected by any member of the combine, from causing a customer or customers of The Journal Company to leave it rather than be denied the use of any other efficient newspaper medium for advertising in the field occupied by the four competitors? No one has seemed to seriously attempt to answer that for defendants in error. Any reason that could be suggested would be so remote and trifling as not to appeal to our reason as the purpose of forming such an elaborate and far-reaching scheme. In only one view that we can even imagine can it be said that substantial conten-

plated benefits to the members of the combine could have been expected, and that is this: Assuming that the reasonable necessities of business required at least two newspaper mediums for advertising in the particular field in question, the advantages of The Journal Company's paper was so great that rather than forego the use thereof it was supposed that advertisers, in considerable numbers, would pay the severe penalty prescribed by the agreement. But that, so far as anything goes which appears in the complaint or the evidence, has little or nothing to rest upon. So, instead of looking into the agreement in vain for anything reasonably suggesting an intent to harm The Journal Company in its business, we have great difficulty in discovering any other intent, and are not able to solve that difficulty without resorting to conjecture.

It follows that we reach the conclusion that the complaint admits of a construction which will satisfy the statute, and also that there was some proof that the defendants in error made the agreement to maliciously injure The Journal Company in its business as charged. We are next to consider whether it was such an injury as satisfies the calls of the statute. Counsel for defendants in error say it was not; that it was only an ordinary agreement between independent persons in their own business, to maintain prices at a particular level for the promotion of their legitimate interests; that such a combination is not illegal in the sense of being actionable at common law; that the statute does not change that, or, if it does, that it is unconstitutional.

We have already proceeded beyond some elements of the above somewhat compound proposition, but those parts to which we have already adverted were so exhaustively gone over by the able counsel who argued the case, both in the main argument and on the reargument thereafter accorded for that special purpose, that we will give some further attention in this connection to what has already been referred to incidentally.

Assuming, for the moment, that the agreement is of the nature contended for, as indicated, and that the statute is aimed at such, it does not follow, in our judgment, that entering into it was not a criminal offense. That one person, acting by himself, or many in combination, may, in the legitimate pursuit of their own business, injure the business of a rival even to the extent of impoverishing him and driving him out of the

field of industry occupied in common, leaving him remediless for his misfortune in the absence of a statute to the contrary, must be admitted. National and State legislatures have dealt with that subject in many instances, in recent years, and uniformly with success, so far as regards constitutional limitations—so much that way that the man of learning must be recognized as one of courage who will attempt at this late day to challenge legislative power in that regard on constitutional grounds. The time seems past for that, as regards combinations of individual independent interests, designed to remain independent for most purposes, but to act in combination to control trade. By numerous decisions of the highest courts in this country, the police power incident to sovereignty has been held to be broad enough to permit the legislature to deal, by creating civil or criminal liability, or both, with all combinations in restraint of trade which are void by common-law rules on grounds of public policy, and, within reasonable limits to be set by courts in the light of constitutional safeguards, to say that things are contrary to public policy not so before, to legislate against them and to enforce the legislative will by civil or criminal liability, or both:—within the broad field indicated, to regulate or prohibit any combination of the kind we are talking about, formed for the purpose of restraining trade or disturbing those natural business conditions, where every individual is supposed to be free to contend with every other in the regular course of business. We are speaking here of independent interests concerting together for the purpose mentioned. That must be kept in mind. These questions have been so firmly settled that no court will now venture to do more than to follow what has been decided. Contracts that operate merely in restraint of trade, such as it is contended the one in question was, even though unreasonable, were not actionable at all at the common law. They were void, merely. The courts would not enforce or give effect to them. But new conditions have arisen creating new dangers, or intensifying old ones that were once considered so trifling as to pass unnoticed, calling for new restraints and new remedies. Who can say that sovereign power has been so surrendered as to be left incapable of dealing with that subject. Right or wrong, those dangers have been considered so great, and power to deal with them so ample, that legislation has gone to the length we

have indicated, making combinations to stifle independent, individual competition, illegal and actionable, civilly and criminally, all upon the broad ground that legislative authority exists in the administration of the police power, to regulate or prohibit those things which are contrary to public policy by the rules of the common law; and to go further and determine, in the light of new conditions, what is detrimental to the public welfare, and to legislate accordingly.

On what has been said, the following of many authorities that might be cited are in point: *U. S. v. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007; *Gibbs v. McNeeley* (C. C.) 102 Fed. 594; *Nester v. Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247; *People v. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *People v. Nussbaum*, 32 Misc. (N. Y.) 1; 66 N. Y. Supp. 129; *Leonard v. Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728; *People v. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437; *Ford v. Association*, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298. The number of cases that could be cited on this subject is so great that no attempt has been made to do more than collect here a few that contain pretty full discussions thereof. A study of them reveals the fact that the power of public opinion in favor of preventing combinations to stifle individual freedom in business and the sacrifice of those benefits that are popularly supposed to flow from free competition, has led to legislation in most of the States of the Union, as well as by the Federal Congress, and that in but very few instances has such an enactment met the bar of the Constitution of State or Nation. A late work that treats of police powers, sums up the subject here under discussion thus:

"It is believed that the constitutionality of none of the numerous anti-trust statutes has been successfully questioned on the ground that they infringed the personal liberty of contract, in punishing civilly or criminally the entrance into a contract or combination in unreasonable restraint of trade. That such contracts and agreements are void, independently of statute and at the common law—so far, at least, as to justify the courts in refusing to enforce them or in any other way to

give the parties to them the aid of judicial process in protecting and enforcing the rights of parties, which grow out of such agreements—has been too long the settled rule of law, to admit of any serious question now. And the power of the State to declare such contracts unlawful being conceded, it is completely within the discretion of the legislature to determine whether such unlawful contracts and combinations shall be simply ignored by the courts or the parties to them be subjected to criminal or civil liabilities." 1 Tied Cont. of Pers. & Prop. § 112.

Coming back to the question of whether the malicious injury which the complaint charges against the defendants in error is such an injury as the one named in the statute, it seems that it makes little difference whether we view the statute as merely declaratory of the common law or as in the line of the numerous State statutes to which we have referred, condemning combinations to restrain, or injurious to, trade. It has the distinctive element of malice, which satisfies common-law requirements of a malicious combination to injure, which is actionable for civil damages and punishable as a criminal offense by common-law rules, as we shall see later. Much confusion is created in cases of this kind by using expressions of courts made on one state of facts or as regards one form of action, to support a conclusion in a case involving a different principle. A large number of cases are cited to our attention where it is said that, if an act committed by one is not actionable, it is not where committed by many acting in concert. The fallacy of that, as applied to conspiracy in its criminal aspect, where there is the distinct and substantive wrong of intent to injure, was sufficiently treated by this court in *Martens v. Reilly* (decided Jan. 8, 1901) 109 Wis. 464, 84 N. W. 840. Counsel for defendants in error, however, insist upon that doctrine in this case, citing many civil cases where it has some application, damages being the gist of the action, among which are three late English cases that deserve careful consideration. If the doctrine of those cases, as settled in the last of them, is to prevail, we must all revise our notions of the law of conspiracy, and the books must be rewritten. The following are the cases referred to: *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 598, S. C. decided in House of Lords and reported in (1892) App. Cas. 25; and *Mutley v. Sim-*

mons (1893) 1 Q. B. Div. 181. The first case involved a combination to monopolize trade at the expense of plaintiff, but no element of malice was found. The action was to recover damages. In that situation it was true that the defendants were not liable in combination if one of them would not have been had he acted alone. The interesting feature of that case is absence of malice. When first decided all the learned judges who wrote upon the question reached the conclusion on which the judgment of the court was entered, upon the theory that no specific intent on the part of the defendants to injure the plaintiff wrongfully, no malice, was disclosed by the testimony. Bowen, L. J., said: "Certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several." "A combination may make oppressive or dangerous that which, if it proceeded only from a single person would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." Fay, L. J., said: "I lay out of consideration this case of competition used as a mere engine of malice, even where I do not in terms repeat the exception." Lord Hannen said: "I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure plaintiffs, whether they, the defendants, should be benefited or not." *The Mogul S. S. Co. Case*, as appears from the opinions rendered in both courts, is full of expressions showing that it was not supposed then that an act, not actionable if perpetrated by one, could not be made so when perpetrated by several in combination, or that liberty to form business combinations to promote the business of the members thereof in the free course of trade, applied to combinations of traders in the same calling to maliciously injure a rival. The free course of trade that one, or a number in combination, may legitimately enjoy, does not include the right to maliciously injure another in his free course of trade. Such is the decision in the *Mogul S. S. Co.'s Case* on its face. We should say that must have been the view of the learned men who pronounced the opinions in that case, if it were not for what followed in the subsequent case, because it is in harmony with

many decisions cited and approved in the opinions, a good instance being *Gregory v. Brunswick*, 6 Man. & G. 205, where it was held that preconcerted hissing of an actor, for the purpose of injuring him in his profession, was actionable. That and many other cases decided on the same principle were approved. If we say that such principle had prevailed in the English courts for two centuries prior to the *Mogul S. S. Co. Case*, we are supported by the Lord Chancellor in *Allen v. Flood* (1898) App. Cas. 1. There the element of conspiracy was absent, but the element of malice was present. The majority of the court there, contrary to what was said, inferentially at least, and what all of the judges were so careful to say as to indicate that it was the turning point in their minds, in the *Mogul S. S. Co. Case*, decided that malice in and of itself could not render that a ground for civil liability which without it would be lawful. The reasoning to support that and the decision, at least as applied to a conspiracy with malice, is out of harmony with right and justice, and out of harmony with a multitude of cases that had been theretofore decided by English courts, and the teachings of those who had built and filled the storehouses of learning from which all draw, outside of legal opinions. How can it be harmonized with *Gregory v. Brunswick*, where the conspirators were held liable because of their malicious purpose; and *Clifford v. Brandon*, 2 Camp. 358, a similar case; or *Garret v. Taylor*, Cre. Jac. 567, where malicious impeding of workmen was held actionable—the authority of which, up to *Allen v. Flood*, had never been questioned. Those simple cases contain all the principles which govern this case, on the particular question under discussion.

The decision in *Allen v. Flood* was not reached by any great weight in number. Lord Watson, who delivered the main opinion in favor of it, confessed that the rule established was new in English law. The Lord chancellor labored with great vigor to stem the tide of what he considered would amount to a judicial destruction of a system of law, on an important subject, which was as old as the common law. He said that the decision overruled the views of the most distinguished judges of England who had spoken on the subject for 200 years; that it was a departure from the principle that had theretofore guided the courts in the preservation of individual

liberty. He cited numerous expressions of the character of those which we have quoted from the opinions of the judges in the *Mogul S. S. Co.'s Case*, and said that, "If the elements, which each noble lord in turn pointed out did not exist in that case, had in fact existed, the decision would have been the other way." Lord Morris said that the decision overturned "the overwhelming judicial opinion of England." In that situation one can discover very little in the case to warrant adopting it and extending the principle thereof to a combination to maliciously injure.

After *Allen v. Flood*, it was but a step to reach *Huttley v. Simmons*, *supra*. The conclusion there was in harmony with what Lord Halsbury evidently anticipated would be the final outcome of the rule he so vigorously dissented from. The court held, combining the doctrine of the *Mogul S. S. Co. Case* and that of *Allen v. Flood*, that a conspiracy with malice, to do an act, gives a right of action only when the act agreed upon to be done and in fact done, would have been, without pre-concert, actionable as a civil injury; because an act lawful without malice is not made unlawful by the addition of the element of malice.

While it is true that the doctrine of the cases referred to, even up to the final conclusion in *Huttley v. Simmons*, has to some extent influenced the judicial policy of this country, it is safe to say that the teachings thereof have not, up to this time, been adopted here in any material degree. In courts where it has been partially adopted there have often been most vigorous dissents, as for example, *Passaic Print Works v. Ely & Walker Dry-Goods Co.*, 44 C. C. A. 426, 105 Fed. 163. Mr. Eddy, in his work on Combinations, published the present year, after a very careful review of all of those cases, said, speaking of *Huttley v. Simmons*:

"If this decision be sound, there is little indeed to the law of civil conspiracy. The conclusion reached is logically correct if the premises be admitted. If the proposition is sound that a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would have involved a civil injury to the plaintiff, regardless of any confederation, then the combination is entirely immaterial, and the entire law of civil conspiracy is a superfluous discussion.

* * * But, notwithstanding the decision in *Huttley v.*

Simmons, we believe the law for England, and certainly for the United States to be well settled, to the effect that parties to a conspiracy may be liable for damages occasioned by acts which, if done by individuals severally, would not give rise to a cause of action." Section 503.

In order to well understand that characterization, one must know that, after a review of numerous cases, the author deduced the conclusion that the element of malice, the intent to injure on the part of several acting in combination, will make that actionable that would not otherwise be so.

This court has often held that an executed conspiracy to inflict a malicious injury is actionable. To hold otherwise now and follow *Huttley v. Simmons*, would be to overrule those cases. *Bratt v. Swift*, 99 Wis. 579, 75 N. W. 411; *Association v. Niezerowski*, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127; *Gatzow v. Buening*, 106 Wis. 1, 81 N. W. 1003. The great weight of authority, almost all authority, is to the same effect. We give a few citations. 1 Hawk. P. C. 446, § 2; *State v. Stewart*, 59 Vt. 273, 9 Atl. 559; *Carew v. Rutherford*, 106 Mass. 14; *Ertz v. Exchange Co.*, 79 Minn. 140, 81 N. W. 737; *State v. Buchanan*, 5 Har. & J. 317; *Com. v. Waterman*, 122 Mass. 57; *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, (C. C.) 60 Fed. 803; *State v. Norton*, 23 N. J. Law, 33; *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307; *Smith v. People*, 25 Ill. 17; *Crump v. Com.*, 84 Va. 927, 6 S. E. 620; *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924.

In the last case above cited, Phillips, J., speaking for the court, summed up the subject under discussion thus:

"Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. 'Malice,' as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious; and

an act maliciously done, with the intent and purpose of injuring another, is not lawful competition."

That expresses the common-law doctrine and the one that prevails here. How contrary it is to *Huttlley v. Simmons* appears without a suggestion.

The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine to monopolize trade and render combinations successful by the malicious destruction of the business of competitors is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law. The ideas pressed upon the attention of the court in this case have been pressed upon every court in the land where opportunity therefor has been presented since the decision in the *Mogul S. S. Co. Case*. So far as then developed they were presented in *Farmer's Loan & Trust Co. v. Northern Pac. R. Co.*, *supra*, and rejected, the learned circuit judge who wrote the opinion quoting with approval from *Com. v. Carlisle*, Brightly, N. P. 36, the following:

"It will therefore be perceived that the motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

Frequent recurrence to the fundamental principles of actionable conspiracy is essential to keep from ingrafting upon a judicial system something which is entirely new, to meet the desires of those who arrogate to themselves the right, not only to monopolize trade or effort in some particular field, but, under the guise of fair trade, to control or destroy the business of competitors without any expectation of profit to themselves—to wrongfully harm such competitors merely because they insist upon individual right to conduct individual

business in one's own way. A combination with the malicious purpose indicated is an actionable wrong. Had it not been for section 4568, Rev. St. 1898 adding to the common-law essentials of an indictable conspiracy the necessity for an overt act, section 4466a, would have been unnecessary to enable the court to punish, criminally, such wrongs. That is a mere declaration of the common law. It operates as a repeal, by implication, of section 4568 so far as otherwise a specific overt act would be required to render a malicious conspiracy, to injure the trade, business, reputation or profession of another, an offense. The old doctrine, with its ancient meaning, should be referred to in construing section 4466a. An actionable conspiracy is a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object by criminal or unlawful means, or a lawful object by criminal or unlawful means. One may, through purely malicious motives, attract to himself another's customers and the injury be so slight in contemplation of law that "*De minimis non curat lex*" applies; but when he unites others with him to maliciously injure the business of another for the mere gratification, in whole or in part, of a desire to inflict such injury, the condition of there being the combined force of many directed towards another, characterized by the element of malice, renders the act of combining for the particular purpose unlawful and a substantive offense, in the absence of a statute requiring some additional element. As said, in effect, in *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, *supra*, the union of individual forces by agreement, to accomplish the injury, gives to such agreement the character of a purpose to reach the end in view by violence, and the accomplishment thereof the character of a purpose effected by violence. The law never has and probably never will leave an individual, or class of individuals, remediless against such a wrong.

This opinion has been carried to great length. The justification therefor, if there is any, lies in the importance of the case and the numerous questions presented for decision. All of such questions, as regards the character of the wrong complained of, from the standpoint of counsel for defendants in error, have their best support in the three English cases to which we have particularly referred. A full discussion of them, as it seems, leave little more that need be said. As indicated

at the commencement, a long opinion was unavoidable if reference was to be made even briefly to the many points presented in the voluminous briefs of counsel. As it is, there are some to which we have referred only briefly, though it is believed that all have been covered in principle. Our conclusion is this: the term "malicious injury," as used in the statute, is synonymous with that term at the common law; it refers to the infliction of a wrongful injury intentionally; such a wrong is actionable even though the same purpose, if formed and executed by an individual, would not, in contemplation of law, be considered sufficiently serious to call successfully for legal redress. There is nothing in this militating at all against the right of individuals to combine and associate together for the purpose of promoting their individual welfare in any legitimate way. It strikes only at the assertion of a right of combining to resort to the use, as a single power, of the individual abilities and resources of two or more to wrongfully accomplish harm to another in the line of those things mentioned in the statute. It is in harmony with the doctrine, so definitely stated by Baron Brammel in *Reg. v. Druitt*, 10 Cox, Cr. Cas. 593, that it has often been quoted by courts and textwriters and nowhere rejected: "The liberty of a man's mind and will to say how he shall bestow himself and his means, his talents and his industry, is as much a subject of the law's protection as that of his body;" and "if any set of men agree among themselves to coerce that liberty of mind and thought by compulsion and restraint, they are guilty of a criminal offense."

The orders of the Circuit Court discharging the defendants in error are severally reversed and the cause is remanded with directions to remand them to the sheriff of Milwaukee County.

DODGE, J., took no part.

EX PARTE DELA.

25 Nev. 346—83 Am. St. Rep. 603—60 Pac. Rep. 217.

Decided March 7, 1900.

HABEAS CORPUS—PRACTICE: *Scope of the writ of habeas corpus—Void conviction—Indictment for murder, but verdict, guilty of rape—Statutory crimes independent of each other—Recitals in commitment.*

1. The recitals of a commitment at the time of passing sentence to the effect that the court informed the petitioner of the finding of the indictment against him for murder, of his arraignment, plea, trial, and the verdict of the jury, are not sufficient to raise a presumption that he had been convicted of murder in the second degree, such recitals, being of mere matters of procedure, and no part of the judgment, and which, if not included in the commitment, would not affect the right of the warden to detain the prisoner.
2. A judgment or commitment, reciting court and cause, and the sentence defining the punishment, and a statement of the offense for which the punishment is inflicted, is sufficient.
3. The jurisdiction of a court or judge to render a particular judgment or sentence by which a person is imprisoned is a proper subject of inquiry on *habeas corpus*.
4. In a proceeding on *habeas corpus* where it is shown by the return that the petitioner is detained by virtue of a process issued upon a judgment of a competent court of criminal jurisdiction, such showing is *prima facie* only of the fact, and may be attacked or impeached by the record of the action, for the purpose of showing such excess or want of jurisdiction of the court or officer rendering or issuing the same as to make its action absolutely void, and that where the record shows such excess of jurisdiction, or such want of jurisdiction, as to render the judgment or process void, the petitioner, under such showing, is entitled to his discharge.
5. Upon an indictment and trial for murder, and a verdict adjudging defendant guilty of rape, the court has no jurisdiction to sentence and imprison defendant for such crime of rape, since the Constitution (art. 1, sec. 8) requires presentment and indictment for the particular offense before conviction is had, and, further, because the defendant is hereby deprived of his liberty without due process of law.
6. Murder is a distinct class of offense under our law. It is a generic offense. Rape is of another class, and is also, a generic offense. Hence, the act making all murder which shall be committed in the perpetration of arson, rape, etc., murder in the

first degree, did not create a new crime, but merely made a distinction, with a view of different degrees of punishment, based on different grades of crime.

7. Under our statute making murder committed in the perpetration of rape, arson, etc., murder in the first degree, proof that the murder was committed in the perpetration of such other offense stands in lieu of the proof of malice aforethought.

Supreme Court of Nevada.

Habeas corpus proceedings by Joseph Dela. Writ granted.

A. J. McGowan, for the petitioner.

W. D. Jones, Attorney General, contra.

MASSEY, J. The facts shown by the petition, the return of the warden, and otherwise, are all conceded. It was shown that the petitioner was indicted by the grand jury of Lincoln County on the 31st day of October, 1895, for the crime of murder, committed on the 13th day of October, 1895; that he was tried therefor on the 13th day of November, 1895, in the District Court of the Fourth Judicial District of the State of Nevada, in and for Lincoln County, by a jury, and convicted of the crime of rape; that on the 16th day of November, 1895, he was sentenced to serve a term of 20 years in the State prison, under a judgment based upon said verdict convicting him of the crime of rape.

The indictment upon which he was tried charges him with having committed the crime of murder in the perpetration of rape upon one Liza, an Indian girl under the age of 14 years.

The commitment set up in the return of the warden, after properly stating the court and cause, recites: "This being the time set for passing sentence, the defendant, with his attorney, F. X. Murphy, Esq., together with the District Attorney, T. J. Osborne, Esq., are in court. The defendant, Joseph Dela, was then informed by the court of an indictment having been found against him by the grand jury of Lincoln County, State of Nevada, on October 31, A. D. 1895, for the crime of murder, alleged to have been committed on or about the 13th day of October, 1895, at the said Lincoln County, and the State of Nevada; of his arraignment thereon on the 4th day of November, A. D. 1895; of his plea of not guilty as charged in the indictment on the 4th day of November, A. D. 1895, and of said plea being duly entered; of his trial and the ver-

diet of the jury on the 14th day of November, A. D. 1895. The defendant was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him. No legal cause appearing or being shown to the court why judgment should not be pronounced in this case, the court rendered its judgment, and 'it is ordered, adjudged, and decreed that you, Joseph Dela, be punished for the crime of which you have been convicted in this court, by being incarcerated in the State prison of the State of Nevada for the term of twenty years. Defendant is remanded to the custody of the sheriff.' "

The clerk of the court certifies that the foregoing is a full, true, and correct copy of the original judgment in the case of the State of Nevada against Joseph Dela.

The verdict returned, after reciting the court and cause, is as follows: "We, the jury in the above-entitled action, find the defendant guilty of rape. I. N. Garrison, Foreman."

The petitioner claims that under the showing made by the petition, return of the warden, and the record, the court exceeded its jurisdiction in rendering the judgment and imposing the sentence, and it is therefore null and void, and that the process issued thereon does not warrant his detention.

Against this claim it is contended that the commitment set up in the return of the warden shows that the petitioner is restrained of his liberty pursuant to a valid judgment of a competent court of criminal jurisdiction, and a valid process issued thereon; that the court had jurisdiction of the person of the petitioner and the subject-matter, namely, the crime of murder, charged in the indictment; and that such showing not only authorizes his detention, but is conclusive, and cannot be attacked or impeached on *habeas corpus*. Is the commitment valid, and does it show a valid judgment of a court of competent jurisdiction?

By section 450 of our Criminal Procedure (Gen. St. § 4330) it is required that, when judgment upon a conviction is rendered, the clerk shall enter the same in the minutes, stating briefly the offense for which the conviction has been had, and shall within five days annex together and file the following papers, which shall constitute the record of the action: First, a copy of the minutes of any challenge which may have been interposed by the defendant to the panel of the

grand jury, or any individual grand juror, and the proceedings thereon; second, the indictment and a copy of the minutes of the plea or demurrer; third, a copy of the minutes of any challenge which may have been interposed to the panel of the trial jury or an individual juror, and the proceedings thereon; fourth, a copy of the minutes of the trial; fifth, a copy of the minutes of the judgment; sixth, the bill of exceptions, if there be one; seventh, the written charges asked of the court, if there by any.

By section 451 of the same act it is provided that a certified copy of the entry of the judgment as required in section 450, *supra*, shall be furnished forthwith to the officer whose duty it is to execute the judgment, and that no other warrant or authority is necessary to justify or require the execution thereof, except when judgment of death is rendered.

We have then before us, as a part of the warden's return, a full and complete copy of the judgment. In one essential matter it fails to comply with the requirements of section 450. It does not briefly, or in any manner, state the offense for which the petitioner had been convicted. We cannot know, nor can the warden know, therefrom, the offense for which the prisoner was convicted and committed.

It appears from the judgment that the petitioner was convicted of some crime, but it is left to be surmised what the crime is. It might be claimed, as it was claimed on the argument, that the recitals of the commitment at the time of passing sentence, to the effect that the court informed the petitioner of the finding of the indictment against him for murder, of his arraignment, plea, trial, and of the verdict, were sufficient to raise a presumption that he had been convicted of the crime of murder in the second degree. But these recitals are no part of the judgment, and are only in keeping with the requirements of a preceding section of the same act (section 444) as to mere matters of procedure, and not of substantive law, which, if not included in the commitment, would not affect or impair the right of the warden to detain the petitioner.

This has been practically so held by this court.

In *Ex parte Salge*, 1 Nev. 453, it was held that a commitment which was a certified copy of the judgment, reciting court and cause, and the sentence defining the punishment, and

a statement of the offense for which the punishment is inflicted, was a sufficient warrant for holding a petitioner, and was a sufficient judgment.

In California, under a similar statute, the same rule prevailed.

In the case of *In re Ring*, 28 Cal. 253, the Supreme Court of that State held that a certified copy of a judgment in the hands of the warden as a commitment, which failed to state the offense for which the prisoner had been convicted, was not sufficient to warrant his detention, but refused to discharge him because it was shown that the judgment entered in the minutes of the court under the requirements of the statute did contain such statement, and could readily be obtained. The Supreme Court of that State has in later cases followed the rule laid down in the case cited. (*Ex parte Raye*, 63 Cal. 492; *Ex parte Williams*, 89 Cal. 421, 26 Pac. 887.)

This court has also held a judgment of conviction void in proceedings on *habeas corpus*, for uncertainty in defining the time for which the defendant was sentenced to prison. (*Ex parte Roberts*, 9 Nev. 44.)

It therefore appears from the statute and these decisions that there are two essentials to a valid judgment of conviction, and a process of commitment issued thereon, namely, the statement defining the punishment and the statement of the offense for which the punishment is inflicted. We are unable to see why a judgment or commitment should be held insufficient for the omission of one essential, and sufficient in case of the omission of the other.

Are the recitals of the commitment, showing a judgment of a court having jurisdiction of the offense charged and of the person of the petitioner, conclusive of the legality of the imprisonment, and can it not be attacked or impeached on *habeas corpus*? By section 15 of the act regulating proceedings on *habeas corpus* (Gen. St. § 3685), it is provided that the party brought before the judge on the return of the writ may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency of the same, or allege any fact to show that either his imprisonment or detention is unlawful, or that he is entitled to his discharge.

But this claim of conclusiveness is based upon a subsequent section of the same act (Gen. St. § 3689), providing that it

shall be the duty of the judge, if the time during which the party may legally be detained in custody has not expired, to remand such party, if it shall appear that he is detained in custody by virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree, or in cases of contempt of court. This section does not prescribe the method by which such fact shall be made to appear, and we must conclude that such showing was intended to be made according to the usual method of procedure in civil actions; that is, by the record of the case. Construing this section with section 15, *supra*, and with the immediate succeeding section, we think it was clearly intended that the jurisdiction of the court should be a matter to be properly inquired into on *habeas corpus*. This not only appears to be the rule of our statute, but we believe it is the rule generally, and is sustained by a large number of well-considered cases of the courts of other States, and of the Supreme Court of the United States.

"The jurisdiction of a court or judge to render a particular judgment or sentence by which a person is imprisoned is always a proper subject of inquiry on *habeas corpus*." (9 Am. & Eng. Enc. Pl. & Prac. 1060.)

In one case the Supreme Court of the State of New York, passing upon the precise question raised here, namely, the conclusiveness of the showing made in the commitment by the return of the warden, held that the petitioner could impeach the recitals in the commitment; basing this conclusion upon the just and logical reason that, it being the office of the writ to ascertain whether the prisoner is unlawfully imprisoned, there would otherwise be no method of showing the want of excess of jurisdiction in the court rendering the judgment. (*In re Divine*, 21 How. Prac. 80.)

In a later case the Court of Appeals of the same State exhaustively discusses and reviews the principle involved, and concludes: "If the process is valid on its face, it will be deemed *prima facie* legal, and the prisoner must assume the burden of impeaching its validity by showing a want of jurisdiction. Error, irregularity, or want of form is no objection, nor is any defect which may be amended or remedied by the court from which it issued. If there was no legal power to render the judgment or decree or issue the process, there

was no competent court, and consequently no judgment or process. All is *coram non judice* and void." (*People v. Liscomb*, 60 N. Y. 571.)

A very full discussion of the doctrine will also be found in *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872. The Supreme Court of California has practically held to the same effect. The same doctrine is held to be the law by this court in *Ex parte Winston*, 9 Nev. 74. We must therefore conclude that while the court on *habeas corpus* has no power to inquire into mere irregularities or errors growing out of methods of procedure which are properly reviewable on appeal, yet, under a proper case, it will in such proceedings inquire into the jurisdiction of the court rendering the particular judgment, to ascertain whether such judgment is void for want or excess of jurisdiction, and to ascertain, in like manner, whether the process issued upon such judgment under which the petitioner is held is also void.

The petitioner was indicted for the crime of murder, alleged to have been committed in the perpetration of the crime of rape. He was tried for the crime of murder. The jury returned a verdict which in direct terms convicts him of the crime of rape. The court sentenced him to 20 years' imprisonment for the commission of the crime of which he had been convicted.

Murder is defined by our statute (Gen. St. § 4579) as the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned.

By section 17 of the act (Gen. St. § 4581) it is provided, among other matters, that all murder which shall be perpetrated by means of poison or lying in wait or torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder in the first degree, and shall be punished by the death of the person committing. By section 412 of the Criminal Procedure (Gen. St. § 4292) it is provided that in all cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an

attempt to commit the crime charged. We presume the judgment of the court, imprisoning the petitioner, was based upon this section of the statute.

It is hardly necessary to discuss the question as to whether or not the crime of rape is necessarily included in the crime of murder. Murder is a distinct class of offense under our law. It is a generic offense. Rape is of another class. It also is a generic offense.

The legislature, in passing the act making all murder which shall be committed in the perpetration of arson, rape, etc., murder in the first degree, did not create a new crime, but merely made a distinction with a view of different degrees of punishment, based upon different grades of crime.

It was not necessary at common law to even charge that murder was committed in the perpetration of another crime, and it was sufficient to charge it in the common form; and, upon proof that the crime was committed in the perpetration of another crime, such proof stood in lieu of the proof of malice aforethought. This doctrine is sustained by ample authority of the courts of other States under statutes similar to ours.

In *State v. Meyers*, 99 Mo. 113, 12 S. W. 516, it is said by the court: "The perpetration or the attempt to perpetrate any of the felonies mentioned in the statute during which attempt, etc., the homicide is committed, stands in lieu of, and is the legal equivalent of, that premeditation, deliberation, etc., which otherwise are necessary attributes of murder in the first degree." To the same effect are the following authorities: *People v. Giblin*, 115 N. Y. 197, 21 N. E. 1062, 4 L. R. A. 757; *State v. Johnson*, 72 Iowa, 400, 34 N. W. 177; *Titus v. State*, 49 N. J. Law, 36, 7 Atl. 621; *Com. v. Flanagan*, 7 Watts & S. (Pa.) 418.

It is conceded that the court had jurisdiction of the person of the petitioner, and jurisdiction of the subject-matter, namely, the crime of murder, of which he was charged.

It is also conceded that the court had jurisdiction to try and punish a person charged with rape. But we hold, under the showing made by the record, that the court had jurisdiction to render the judgment of imprisonment in this particular case?

It is not sufficient to say that as the court has jurisdiction of the person, and jurisdiction to try, convict, and punish for

certain crimes, it necessarily has the jurisdiction over the subject-matter in a particular case.

The exercise of jurisdiction in this and all cases of felony depends upon certain indispensable conditions and requirements, the absence of which renders the action of the court not merely irregular, erroneous, and voidable, but absolutely void. By section 8, Art. 1, of the Constitution, it is provided, in prohibitive terms, among other matters, that a person shall not be tried for a capital or other infamous crime (except in certain specified cases, of which the case at bar is not one), except on presentment or indictment of a grand jury, and that a person shall not be deprived of his life, liberty, or property without due process of law.

Can it even be pretended that the court, in face of these direct and prohibitive terms of the Constitution, could render a valid judgment of imprisonment for an offense of which it has jurisdiction, without presentment or indictment charging the particular offense?

Would not the action of the court in such proceeding be utterly void, because of excess of jurisdiction, and because it deprived the party of his liberty without due process of law? The question involved is not one of irregularity, growing out of rules of procedure, but is one of substantive law, based upon the direct terms of a constitutional guaranty. It is claimed that the record shows that the prisoner was indicted, tried, convicted, and sentenced for the crime of murder. By supplying presumptuous facts, this contention is probably correct; but the proven facts of the record contradict and impeach these presumptions, and show conclusively that the petitioner was convicted of the crime of rape—a crime for which he was neither indicted nor tried, and of which he could not have been convicted under the charge contained in the indictment.

Finally, we conclude that in a proceeding on *habeas corpus*, where it is shown by the return that the petitioner is detained by virtue of a process issued upon a judgment of a competent court of criminal jurisdiction, such showing is *prima facie* only of the fact, and may be attacked or impeached by the record of the action, for the purpose of showing such excess or want of jurisdiction of the court or officer rendering or issuing the same as to make its action absolutely void, and that where the record shows such excess of jurisdiction, or such want of jurisdiction,

as to render the judgment or process void, the petitioner, under such showing, is entitled to his discharge. Believing the judgment in this case to be void because the court had no jurisdiction of the subject-matter (that is, of the crime for which he was convicted), for the reason that the defendant was neither indicted nor tried for the crime of rape, and that the execution of the judgment deprives the petitioner of his liberty without due process of law, the commitment issued on said judgment does not justify his further detention, and he will accordingly be discharged.

 IN RE JARVIS.

66 Kan. 329—71 Pac. Rep. 576.

Decided February 7, 1903.

HABEAS CORPUS—CONSTITUTIONAL LAW—PEDDLERS' LICENSE ACT: *Question as to whether habeas corpus is the proper remedy against a conviction under a void act of the legislature—Peddlers' License Act unconstitutional.*

1. Where a defendant has been convicted of a misdemeanor in justice court, and no appeal has been had, and the time for an appeal has expired, he may challenge the constitutionality of the statute under which he was convicted, in an application to this court for a writ of *habeas corpus*.
2. Chapter 271, Laws 1901, Gen. Stat. 1901, pp. 3922, 3929, (the peddlers' license act), so far as it exacts payment of a tax by non-residents, from which certain residents of the State are exempted by the fact of their residence, is repugnant to the provision of the federal Constitution that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several states.

(Syllabus by the Court.)

Supreme Court of Kansas.

Original petition for a writ of *habeas corpus* by W. A. Jarvis. Petitioner discharged.

Alden & McFadden, for the petitioner.

A. A. Godard, Attorney General, *J. S. West*, and *James C. Clayton*, for the respondent.

MASON, J. A prosecution was begun before a justice of the peace in Ness County, charging the defendant, W. A. Jarvis, with a violation of chapter 271, Laws 1901 (sections 3922 to 3929, Gen. St. 1901), commonly known as the "Peddler's License Act." The defendant was tried, convicted, and sentenced. He asks this court to discharge him upon *habeas corpus*, upon the ground that the act referred to is unconstitutional. The State files a motion to quash the writ, and submits the whole matter upon the motion; urging that, even if the unconstitutionality of the statute were conceded, the petitioner could not be discharged in this proceeding, under the rule lately announced in *In re Gray*, 64 Kan. 850, 68 Pac. 600. The doctrine of the *Gray Case*, however, does not extend to the case at bar. In that case the petitioner was arrested and held for trial under an ordinance which he claimed to be unconstitutional. This court refused to examine into and determine the question so sought to be raised in advance of the decision of the court before which the matter was pending. There the very question which this court was asked to decide was in a fair way to be speedily determined in the lower court, and the petitioner, if aggrieved by the decision, had his remedy in the ordinary course of judicial proceedings, by appeal. The court held that, under our statute, as the prisoner was held under process issued upon what was, in effect, an information, the statute did not authorize an inquiry into the validity of the custody upon *habeas corpus*. But in the present case the petitioner has been convicted and sentenced, and is held upon a commitment issued, not upon an indictment, information, or complaint, but upon a final judgment.

It has been held in many well-considered cases that even after conviction the defendant will not be permitted to have the constitutionality of the act under which he is prosecuted investigated upon *habeas corpus*. The argument is that the judgment of the trial court upholding the validity of a statute in fact unconstitutional is not a utility, but binds the parties unless vacated upon direct attack by proceedings in error. The greater weight of authority, however, favors the view that an unconstitutional law is a utility—is no law at all—and that a conviction under it is not merely erroneous but void, and subject to collateral attack upon *habeas corpus*. This view doubtless results more from a jealous regard for the personal liberty of the

citizen than from the force of the reasoning employed as applied to other subjects of litigation. The authorities upon both sides of the question are collated and discussed in a note to *Koepke v. Hill*, 87 Am. St. Rep. 161, at pages 174 to 176 (157 Ind. 172, 60 N. E. 1039), and in a note to *Hovey v. Elliott*, 39 L. R. A. 449, at pages 450 to 454 (145 N. Y. 126; 39 N. E. 841). But this case presents a special feature of the general question. The petitioner was convicted in justice court, and the time within which he might have appealed to the District Court has gone by. Gen. St. 1901, § 5826. He either has a remedy by *habeas corpus* or he has no remedy at all. It may be urged that having lost the remedy of appeal, permitting the time to elapse, he is not in a situation to avail himself of this consideration. In response to this it may be said, however, that the statute provides no appeal, except upon the giving within 24 hours of a recognizance, with sureties, for appearance at the District Court. In some cases this might be prohibitive.

Without at this time passing upon the question in any other aspect, we decide that where a defendant has been convicted of a misdemeanor in justice court, and no appeal has been had, and the time for an appeal has expired, he may challenge the constitutionality of the statute under which he was convicted, in an application to this court for a writ of *habeas corpus*.

The petitioner claims that the statute in question is unconstitutional upon several grounds, only one of which it will be necessary to consider. The statute provides that it shall be a misdemeanor for any one to deal as a peddler without paying for and procuring a license from the county clerk, but expressly exempts from its operation the owner of goods, peddling them in the county in which he is a resident taxpayer, or in any county immediately adjoining thereto. The statute, therefore, attempts to impose a tax upon non-residents of the State, from which certain residents of the State are exempted by the fact of such residence. This is an obvious discrimination in favor of the resident and against the non-resident, and is repugnant to section 2 of article 4 of the Federal Constitution, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. *Ward v. Maryland*, 12 Wall. 418, 20 L. Ed. 449; *Fecheimer Bros. v. City of Louisville*, 84 Ky. 306, 2 S. W. 65; *Graffy*

v. City of Rushville, 107 Ind. 502, 8 N. E. 609, 57 Am. Rep. 128. The petitioner avers that he is a citizen and resident of the State of Georgia, and is, therefore, in a situation to complain of the discrimination.

The motion to quash will be overruled, and the petitioner discharged. All the justices concurring.

Notes (By J. F. G.)—*An act of the legislature in violation of the Constitution is in violation of the supreme law of the land—It is not law—Habeas Corpus the proper remedy—The term unconstitutional law, a self-contradicting term.*

When a legislature performs the physical action of passing a bill in violation of the Constitution, it acts beyond its legislative powers, and cannot give to the bill thus the essential vitality of law. Its act is void and of no effect; an act which calls rather the disapprobation, than obedience. He who ignores it, and acts in contravention of it, acts in accordance with, and not in violation of law, and can not be legally charged with crime therefor. Therefore, one charged with the violation of an unconstitutional act is *prima facie* not accused of any crime, and is entitled to his release through the action of a writ of *habeas corpus*.

This proposition is so plain that citation of authorities would seem unnecessary; yet courts have been wrestling with the question as though it was a matter of serious doubt. The great difficulty has arisen through the self-contradictory term, "unconstitutional law," a term which has created much confusion, and never should have been admitted into the vocabulary of legal expression.

In *People v. Jonas*, 173 Ill. 316, the Supreme Court of Illinois in an oral opinion refused to issue a writ of *habeas corpus* to test a conviction had before a justice of the peace, on an alleged unconstitutional act of the legislature. The court held, that the justice of the peace had jurisdiction, not only of the case but to pass on the question as to whether the act was valid, and, that the accused could have appealed, and then by presenting propositions of law could "have preserved for review in a still higher court the constitutionality of the law under which the judgment was rendered." The court overlooked the fact, that if the act was unconstitutional, the record showed *prima facie* that no violation of law was charged, and therefore the justice of the peace had not acquired any jurisdiction to hear the case or enter the judgment.

In the case of *Ex parte Smith*, 16 Ill. 347, it was held that an affidavit based upon an unconstitutional act of the legislature was void, and although the act had been recognized in practice for thirty years, the prisoner was released by a writ of *habeas corpus*. In *Stafford v. Low*, 20 Ill. 152, a bail bond based on the same act was held to be void, while in *Gordon v. Frizzell*, 20 Ill. 291, it was held, that where a *capias* on its face showed that it was based on the same unconstitutional act, it was the duty of the sheriff to release the prisoner.

Ex parte Seibold, 100 U. S. 371, 35 Law Ed. 717, is a leading case holding that *habeas corpus* is a proper remedy to relieve one imprisoned under an unconstitutional act. As to unconstitutional acts, see also case and notes, 13 Amer. Crim. Rep. 7—13.

BANDY v. HEHN, WARDEN OF WYOMING STATE PENITENTIARY.

10 Wyo. 167—67 Pac. Rep. 979.

Decided March 5, 1902.

HABEAS CORPUS—PLEADING: *Habeas corpus a proper remedy where the defendant is sentenced as of a second offense, the former conviction not being pleaded in the information.*

1. By a statute of Wyoming it is provided that, "upon a second conviction of petit larceny in this State, the person convicted shall suffer the punishment prescribed for those convicted of grand larceny." *Held*, that to bring one within the provisions of this statute, the prior conviction must be pleaded in the information and the fact proven the same as any other fact essential to a conviction.
2. In this case the information simply charged the accused with the commission of a petit larceny, to which he pleaded guilty. Upon being called for sentence the court informed him that he would be sentenced to the penitentiary because of his former conviction of petit larceny and refused to allow him to withdraw his plea, and entering a finding as to the previous conviction, sentenced as for grand larceny. *Held*:
 1. That the sentence was illegal and void.
 2. That the accused was entitled to a discharge by means of a writ of *habeas corpus*.

Supreme Court of Wyoming.

Habeas corpus brought by James Bandy, petitioner, against J. H. Hehn, Warden of the Wyoming State Penitentiary. Petitioner discharged.

Nichols & Adams, for the petitioner.

J. A. Van Orsdel, Attorney General.

MR. JUSTICE CORN delivered the opinion of the court. An information was filed in the District Court charging the petitioner with the crime of grand larceny. He pleaded guilty of petit larceny, the plea was accepted by the Prosecuting Officer,

and entered in the journal of the court, and he was remanded to await sentence. Upon being called up for sentence, he was informed that he would be sentenced to the penitentiary, the records of the court showing that he had once before been convicted of petit larceny; whereupon he asked leave to withdraw his plea of guilty, and to plead not guilty to the information. This the court refused to permit for the reason that material witnesses against him had been permitted to depart and the jury for the term had been discharged. The court then proceeded to sentence him to the penitentiary for a term of two years and a half, the judgment reciting that "said James Bandy having heretofore, on June 9, 1900, been convicted of the crime of petit larceny, as will more fully appear on page 355 of this record, therefore, James Bandy is found to be guilty of grand larceny." Our statute, after fixing the penalty in petit larceny at imprisonment in the county jail for not more than six months and a fine not exceeding one hundred dollars, prescribes that, "upon a second conviction of petit larceny in this State, the person convicted shall suffer the punishment prescribed for those convicted of grand larceny." (R. S., Sec. 4985.)

Two questions are presented in this case: First, did the court err in sentencing the defendant to the penitentiary upon his plea of guilty of petit larceny; and, second, conceding that the judgment was erroneous, is the defendant entitled to be discharged upon *habeas corpus*?

It would seem to be beyond controversy that there is nothing to support the finding of the court that the defendant was guilty of grand larceny. He was not tried upon that charge either by a jury or the court, and his plea was guilty of petit larceny only, which, when accepted by the court, operated as an acquittal of the charge of grand larceny upon the same facts. And the statute does not purport that the second offense of stealing property of less value than twenty-five dollars shall constitute grand larceny. The provision relied upon merely designates the punishment by reference to the punishment for grand larceny. It might designate the punishment for an aggravated assault, or any other offense, in the same way. It is plain, theretofore, that the finding is entirely unsupported.

This view of the matter, however, is to some extent technical and formal, and it may, perhaps, be reasonably maintained

that the mere misnaming of the offense will not vitiate the judgment, if it is otherwise legal and valid.

But we think that, in reason and by the great weight of authority, as the fact of a former conviction enters into the offense to the extent of aggravating it and increasing the punishment, it must be alleged in the information and proved like any other material fact, if it is sought to impose the greater penalty. The statute makes the prior conviction a part of the description and character of the offense intended to be punished. (*Tuttle v. Com.*, 2 Gray [Mass.] 505; Clark's Crim. Proc. 204.) In this case the information did not charge the larceny as a second offense, no proof was offered identifying the petitioner as the person shown by the record to have been formerly convicted, his plea of guilty was not to the charge of the larceny as a second offense, and he was denied any opportunity to plead to or defend against such charge. We are clearly of the opinion that the judgment was erroneous, and could not be sustained upon a proceeding in error.

The second question, whether the petitioner is entitled to be discharged upon *habeas corpus* proceedings, presents greater difficulty. Jurisdictional facts alone are to be considered. If the court had jurisdiction of the person and of the subject-matter and to render the particular judgment in question, the inquiry is at an end, and, however, erroneous the judgment may be, the applicant will be remanded into custody. If, upon the other hand, the court had jurisdiction of the person and of the subject-matter, but was without jurisdiction to render the particular judgment, then such judgment is void—is, in effect, no judgment at all—and the applicant must be discharged. This proposition was carefully considered by this court in *Miskimmins v. Shaver*, 8 Wyo. 392, 58 Pac. 411, 49 L. R. A. 831, and we think is well settled by the later and best considered decisions. But the distinctions between judgments which are simply erroneous and voidable and those which are absolutely void are often so narrow that it is not easy to apply them in particular cases.

The view that the action of the court in this case was mere error, and not in excess of its jurisdiction, is very strongly and ingeniously argued by the counsel for the State. The argument is, in substance: That the court, without question, had jurisdiction of the crime of petit larceny as a second

offense. It also had jurisdiction to punish by imprisonment in the penitentiary for that offense. It was true, and was proven to the satisfaction of the court, that the defendant was guilty, and that it was the second offense, and the applicant is, therefore, suffering only the legal and appropriate sentence for his crime. That the method by which the court determined the fact that it was the second offense was merely an error in the procedure, and did not affect its jurisdiction. That, therefore, the judgment is erroneous, but not void.

The argument is ingenious, and, as before remarked, the distinctions between judgments which are merely erroneous and voidable and those which are void are often somewhat elusive. But we are disposed to think the argument proves too much. By the same reasoning, if a prisoner were indicted for petit larceny, and it was proven upon the trial, or otherwise came to the knowledge of the court, that the larceny was from the person and by violence, he might be found guilty of robbery, and sentenced to the penitentiary for fourteen years, while the maximum penalty for the offense to which the prisoner was called upon to answer was but six months in jail and a hundred dollars' fine. The cases seem to be parallel, and yet in the latter it would not be contended that there was a mere error of procedure; very clearly the court would be without jurisdiction to render such judgment, for the reason that its effect is to sentence the prisoner for a crime for which he has not been indicted, upon a charge for which he has not been tried, and to which he has had no opportunity to plead, thus denying him his constitutional right to demand the nature and cause of the accusation against him and to have a trial by jury. He is deprived of his liberty without due process of law. And when any constitutional right or immunity of a person is violated, the judgment of the court is void. (Brown on Jurisdiction, Sec. 97.)

In a case in Nevada the petitioner was indicted for the crime of murder, alleged to have been committed in the perpetration of the crime of rape. By the verdict of the jury he was convicted of the crime of rape, and the court sentenced him to twenty years' imprisonment. He was discharged upon *habeas corpus*, and the Supreme Court, in concluding their opinion, say: "Believing the judgment in this case to be void, because the court had no jurisdiction of the subject-matter (that is,

of the crime for which he was convicted), for the reason that the defendant was neither indicted nor tried for the crime of rape, and that the execution of the judgment deprives the petitioner of his liberty without due process of law, the commitment issued on said judgment does not justify his further detention, and he will accordingly be discharged." (*Ex parte Dela* 25 Nev. 346; 15 Am. Cr. R—; 60 Pac. 217.) The reason here is stronger than in the Nevada case in the respect that the judgment imposes a greater punishment than the maximum authorized by law for the crime of which the defendant pleaded guilty. And it is to be observed also that it is not a case, either, in which the court has simply exceeded its jurisdiction by sentencing the applicant to a longer term than that authorized by law. But it imposed an infamous punishment entirely unauthorized by law for the offense to which he pleaded guilty. It was as completely without jurisdiction to make the order as if it had sentenced him to be hanged.

In *Ex parte Lange*, 18 Wall. 176, 21 L. Ed. 872, Mr. Justice Miller, in discussing this subject, says: "It was error, but it was error because the power to render any further judgment did not exist. It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offense under the statute. It by no means follows that these two facts make valid, however erroneous it may be, any judgment the court may render in such case. If a justice of the peace, having jurisdiction to fine for a misdemeanor, and with the party charged properly before him, should render a judgment that he be hung, it would simply be void. Why void? Because he had now power to render such a judgment. So, if a court of general jurisdiction should, on an indictment for libel, render a judgment of death or confiscation of property, for the same reason, be void."

Counsel contend that the judgment was not a conviction of grand larceny, but of petit larceny as a second offense. We think the record shows that the petitioner was found guilty of grand larceny and sentenced as for that offense, the court apparently adopting the view that petit larceny as a second offense constituted the crime of grand larceny under the statute. But we are unable to perceive that the form of the judgment in that particular affects the questions involved in any substantial way, nor does the fact that the information charged

grand larceny. The petitioner did not plead guilty either to grand larceny or to petit larceny as a second offense, and he was not tried, or in any lawful way found guilty, upon either charge.

For the reasons stated, we are of the opinion that the judgment is void, and that the petitioner must be discharged.

POTTER, C. J., and KNIGHT, J., concur.

EX PARTE SNODGRASS.

43 Tex. Crim. Rep. 359—65 S. W. Rep. 1061.

Decided December 18, 1901.

HABEAS CORPUS—RESTRAINT—CONTEMPT OF COURT: *Constructive restraint sufficient basis for application for writ of habeas corpus*
—*Legitimate argument of counsel not contempt of court.*

1. The relator being in custody of a sheriff for contempt of court, was permitted to temporarily go to his home to attend a sick child, having promised the sheriff to return into custody, etc. *Held*, that he was in sufficient restraint to apply for a writ of *habeas corpus*. Texas statute on "restraint" construed.
2. The relator, an attorney, during argument to a jury, in speaking of two witnesses who contradicted each other, said that one of them had lied. Thereupon, one of the witnesses challenged the remark, and upon the attorney repeating it, he was assaulted by the witness in open court, after which the attorney resuming the same line of argument, was fined for contempt of court, and committed on the fine. *Held*, that he was not in contempt of court.
3. The relations of courts and attorneys are reciprocal, and should be mutually respected.

Court of Criminal Appeals of Texas.

Habeas corpus by Frank L. Snodgrass to set aside a judgment convicting relator of contempt. Relator discharged.

B. D. Tarlton and *Frank L. Snodgrass*, for the relator.
Robt. A. John, Assistant Attorney General, for the State.

BROOKS, J. Upon application of relator for the writ of *habeas corpus*, the same was granted by Presiding Judge Davidson, and made returnable before the court for hearing

on November 13, 1901, at which time the Assistant Attorney General filed the following motion to dismiss the application, to-wit: "Now comes the State by the Assistant Attorney General, and would show the court that the applicant herein was ordered by the District Judge committed to jail pending the payment of the fine of \$50, assessed against him for contempt of court, and that said applicant was never by the sheriff committed to jail, so the State is credibly informed and believes, but was by the sheriff admitted on parole, and permitted to be enlarged, upon his promise to protect him in the premises; and said applicant was beyond the custody of the sheriff, and not within the jail of said Coleman County, before this court admitted him upon bail, as shown by the record herein. Wherefore the State would show the court that, by reason of the enlargement of the applicant, this court is without jurisdiction to hear this application, and the State moves the court that this application be dismissed." The judgment of the court finding applicant guilty of contempt was entered on September 11, 1901, and the commitment was issued on the 26th day of September. The writ of *habeas corpus* was granted by this court on October 7th, applicant being admitted to bail in the sum of \$200, pending the disposition thereof. Relator Frank L. Snodgrass being sworn, stated substantially that, some days after the court fined him, judgment was entered by the court, and upon said judgment commitment was issued; that the sheriff met relator upon the streets, and arrested him on said commitment. Thereupon relator requested the sheriff to appoint some one or go himself with relator to relator's house, as his child was very sick with diphtheria, and relator could not with safety ask the neighbor ladies to wait upon his child with a contagious disease. Relator's wife was dead, and there was no one to properly care for the child besides himself. The officer informed relator he would not go himself, nor appoint any one, but relator could go home, if he would promise that under no circumstances or conditions would he leave the bedside of his child, except to go to relator's office and back. Relator promised upon his honor to comply with the conditions imposed upon him, which he did. While this character of enlargement, if it be termed such, was in existence, relator applied to this court for the writ of *habeas corpus*, which was

granted, and he was released on bond. It will be noted this is an original application for the writ of *habeas corpus*, and not an appeal from an order refusing bail; hence we apprehend the rules covering the same are somewhat different, in reference to the confinement or imprisonment.

Article 170, Code Cr. Proc., provides:

"The same power may be exercised by the officer executing the warrant (and in like manner) in cases arising under the foregoing articles as is exercised in the execution of warrants of arrest according to the provisions of this Code.

"Art. 171. The words 'confined,' 'imprisoned,' 'in custody,' 'confinement,' 'imprisonment' refer not only to the actual, corporeal and forcible detention of a person, but likewise to any and all coercive measures by threats, menaces or the fear of injury whereby one person exercises a control over the person of another and detains him within certain limits.

"Art. 172. By 'restraint' is meant the kind of control which one person exercises over another, not to confine him within certain limits, but to subject him to the general authority and power of the person claiming such right.

"Art. 173. The writ of *habeas corpus* is intended to be applicable to all such cases of confinement and restraint, where there is no lawful right in the person exercising the power, or where, though the power in fact exists, it is exercised in a manner or degree not sanctioned by law."

Article 154, Code Cr. Proc., requires that "every provision relating to the writ of *habeas corpus* shall be most favorably construed in order to give effect to the remedy and protect the rights of the person seeking relief under it." Articles 151, 152, 164, 166, 167, *Id.*, contemplates that a person is entitled to the writ not only in case of actual custody, but also in case of any illegal restraint. Article 172 states that by "restraint" is meant the kind of control which one person exercises over another, not to confine him within certain limits, but to subject him to the general authority and power of the person claiming such right. We think this article alone is decisive of the contention, and that the State's motion should not prevail. We deem it unnecessary to enter into a long discussion of these articles, but suffice it to say that any character or kind of restraint that precludes an absolute and perfect freedom of action on the part of relator authorizes such relator to make

application to this court for release from said restraint. It certainly cannot be insisted that, if relator is illegally arrested (if he is illegally arrested), he must be placed in jail, and thereby be subjected to an additional outrage, before he can apply to this court for the writ of *habeas corpus*. The motion of the State to dismiss the application is overruled.

The following, in substance, are the facts upon which the commitment was based: Relator was an attorney-at-law, and engaged in the practice thereof in the town of Coleman, and was representing his client in the trial of Bob Gatlin, and in the course of his speech before the jury used such language that the court fined him for contempt. The judgment of the court is as follows: "State of Texas, County of Coleman. September 11th, 1901. It is considered and ordered by the court that F. L. Snodgrass be, and he is hereby, adjudged to be in contempt of this court, in this: That during the progress of his argument to the jury in the case of *The State of Texas v. Bob Gatlin*, and in open court, said F. L. Snodgrass, in discussing the testimony of witnesses H. N. Beakley and J. M. Crawford, who testified in said cause, with reference to said two witnesses stated and said to the jury, and in the presence and in the hearing of the court, and in the presence and hearing of the witness, in substance and effect, that either Beakley or Crawford (meaning the aforesaid witnesses) were mistaken, or one of them had lied. That H. N. Beakley, one of said witnesses, upon hearing said statement of F. L. Snodgrass, arose and stated to Mr. Snodgrass that he must not say that he (Beakley) had lied, whereupon said Snodgrass turned toward said Beakley, and, in an excited voice and manner, pointing and waving his hand toward Beakley, stated and said, 'I stated that either you or Crawford was mistaken, or one of you had lied, and I have nothing to take back,' which language and conduct on the part of said Snodgrass provoked said H. N. Beakley, and caused him in open court, and in the presence of the court and jury, to commit an assault and battery upon said Snodgrass; and for which language and conduct on the part of said Snodgrass, in provoking such assault, he is adjudged guilty of contempt of this court, and fined in the sum of fifty (\$50.00) dollars. And it is further ordered and decreed that said Snodgrass be, and he is hereby, committed to the jail of Coleman County, Texas, until such fine and all costs

is paid. It is further ordered that the clerk of this court forthwith issue a writ of commitment to the sheriff or any constable of Coleman County, Texas, commanding such officer to take into custody and commit to jail said F. L. Snodgrass until said fine and all costs are fully paid." We find from an inspection of the affidavits filed both by the State and relator that the foregoing judgment is substantially supported by the affidavits. The affidavit of the trial judge, which contains some additional facts, is as follows: "I was presiding judge in the trial of the case, *State of Texas v. J. M. Gallin*, at September term, 1901, District Court Coleman County, Texas. F. L. Snodgrass represented the defendant on the trial of said case. H. N. Beakley was a witness for the State in said case. Snodgrass, in his speech to the jury in said cause, and in discussing Beakley's testimony in said cause, made use of the language attributed to him in the judgment for contempt. His manner, conduct, and tone of voice at the time he used the language attributed to him in said judgment, and especially at the time he replied to Beakley, was bantering, threatening, and exasperating to a gentleman. I knew nothing of Beakley's presence in the court room until he addressed Snodgrass as recited in said judgment. At the time he addressed Snodgrass, I noticed him take a seat just inside the bar, and some fifteen feet or more from Snodgrass. He had not more than taken his seat when Snodgrass replied as stated in the judgment, and, by the time he got this reply out, Beakley, with a spring, was on him, and struck him. The whole thing occurred in such short time that I had no opportunity to interfere and stop it. I saw nothing in Beakley's hand when he struck Snodgrass, nor did I see any weapons on his person, or any attempt on his part to draw a weapon, though I afterwards learned that a pistol was taken out of his pocket after the row. At the time Beakley seated himself just inside the bar he was within four or five feet of Mr. Little, stepfather of Snodgrass, and only a short distance from Donald Cameron, County Attorney, and, as I am informed, cousin to Snodgrass, and not very far from Judges J. C. Randolph and C. H. Jenkins. As soon as I had the fight stopped, Mr. Snodgrass resumed his argument, and started to repeat, as I thought, his statements with reference to Beakley, when I told him to stop that course of argument; and, he having shown a disposition to persist therein, I told him if

he repeated it I would punish him. (Do not remember the character of punishment.) I did not prohibit him discussing legitimately Beakley's evidence, but directed him not to repeat the statements that had provoked the row. As soon as order was restored I fined both Beakley and Snodgrass, but the judgments were not then entered, nor the writ then issued. I prepared both orders and the writ of commitment in this case, because the District Attorney requested me to prepare the order, and the clerk told me he did not know how to draft the writ if the ordinary form of commitment would not answer. I did not draft the commitment in the Beakley case, because I heard him tell the clerk not to issue on the judgment, but to call on him when he wanted the fine and he would pay it. At and prior to this row in court I knew from common street talk in the town of Coleman that certain men, including F. L. Snodgrass, on the one part, and certain men, including Beakley, on the other part, were unfriendly; and it was also known to me that it was commonly talked in Coleman that some day there would be a wholesale killing between those parties, should the matter ever start. (Signed) John W. Goodwin."

It will be noted from this affidavit, in addition to confirming the statements as contained in the judgment, it says "that relator's manner, conduct, and tone of voice at the time he used the language attributed to him in said judgment, and especially at the time he replied to Beakley, was bantering, threatening, and exasperating to a gentleman." It is not made to appear that relator knew Beakley was in the court room at the time of the argument, until Beakley stopped relator; and we do not think the statement in the affidavit of the trial judge as to the manner in which the statement was made adds anything to the question of contempt or no contempt. We also note the latter clause of the affidavit, to the effect that there was common street talk in the town of Coleman that certain men, including relator, on the one part, and Beakley, on the other part, were unfriendly, and that some day the parties would meet, and that there would be a wholesale killing between these parties. Unless the evidence before us should show that relator was attempting to provoke Beakley to a breach of the peace in the court room at the time of the argument, we could not consider said circumstances as going to illustrate or prove the intent of the relator. The mere fact that it was common, street talk

would not be evidence of applicant's intent, since common street talk is not evidence, but bare rumor. It is also made to appear by the undisputed affidavits that H. N. Beakley and J. M. Crawford testified in the case of Gatlin, then on trial; that their testimony was an exact cross, one of the other (that is, Beakley swore that he did not know the purpose for which certain money was being paid, which was a material inquiry in the trial, while Crawford swore that he did know). Now, the question arises, does the matter set up in the judgment make contempt of court? We are of opinion that it does not. In order to be contempt of court, the trial court must have not only jurisdiction of the person of the relator, but he must also have jurisdiction of the subject-matter, and render the particular judgment rendered. He had jurisdiction of relator, but he did not have jurisdiction of the subject-matter, because he did not have the power or legal authority to enter the judgment against relator for the statements made as contained in the judgment. If he did, then it would destroy relator's right to argue the cause of his client in the courts of justice. It is a constitutional right guaranteed every one tried in the courts of this State to be heard in person and by counsel; and certainly where two witnesses testify, one for and the other against a certain proposition, showing an absolute and unqualified contradiction, there is but one of two conclusions to be drawn—that one or the other testified falsely, or one or the other is mistaken. Relator's argument seems to have been a charitable enough, placing it in the alternative. No other conclusion could be drawn from said contradictory statements but that one had testified falsely, or had been mistaken. This seems to have been a strong circumstance in the trial of the case, and certainly relator not only had the right but it was his duty to his client, to comment upon and make manifest the fact that Crawford, defendant's witness, had told the truth, and that Beakley had not told the truth. Courts will look with much allowance upon the zeal and partisanship of counsel representing their clients in the courts. Without zeal, and without an honest and fervent desire to have everything done and to do everything that can be done within his power that is honorable to promote the interests of his client and secure him a fair and impartial trial, the object of counsel would be destroyed, and the bar would soon fall into disrepute. In *Duncan's Case*, 42 Texas

Crim. Rep. 661, 62 S. W. 758, 2 Tex. Ct. Rep. 402, a question very similar to the one now under discussion was before us; and, among other things, we said: "We wish to say that the power of the court is official—judicial, and not personal; and the relations of court and attorney are correlative. Courts may, will, and should enforce judicial power and functions when necessary; yet this must be done in a manner sanctioned by law, and in consonance with judicial dignity, and with due regard to the rights of parties to be affected. Attorneys are bound and will be held to obey legal orders of courts; yet the court should invoke its judicial authority under the law, and in obedience thereto. The relationships of court and attorneys, bench and bar, are reciprocal, and each, in their proper sphere, is clothed with powers, rights, and privileges which are to be recognized and respected by the other. These relations should be recognized and respected alike by the bench and bar, and, being carefully kept in view and followed as rules of action and conduct, will avoid friction." We would not be understood as holding that the trial court has not the right to maintain the decorum of the court-room, nor would we be understood as holding that the court could not require relator's argument to be limited to the facts in evidence, or limit his address to the jury to rational, decent, and decorous deductions from the facts in evidence. Only this limitation, and nothing more, can be placed upon arguments of attorneys by the trial court. We are at a loss to know how relator could have commented upon the testimony of the conflicting witnesses otherwise than as he did. Perhaps relator could have avoided placing the testimony of said witnesses before the jury as either a lie or mistake, by saying that one of the parties was mistaken. This would still have left the jury to infer, if they desired to do so, that it was a willful mistake, and hence a lie. Be this as it may, it was a legitimate character of argument to be used in the trial of the case, as disclosed by the affidavits on file. Courts must not attempt to evade the province of counsel, and dictate as to the character of argument to be made upon any given state of facts, other than as indicated above. We do not think relator violated either the letter or spirit of the law with reference to contempts; but, on the other hand, we think his argument was legitimate and germane to the facts being discussed, and the infliction of the fine by the trial judge was wholly unwarranted

by the law and facts adduced upon the trial hercof. An inspection of the judgment shows the injustice thereof.

Relator is accordingly discharged.

HENDERSON, J. (dissenting). When the relator applied for the writ of *habeas corpus*, as appears from the testimony, he was not in jail under the commitment, but had the liberty of the town, under an arrangement with the sheriff of Coleman County. This, I think, was an escape, and the motion of the Assistant Attorney General ought to have prevailed, and the application should have been dismissed. The writ required the sheriff to confine the relator in the jail of Coleman County in default of the payment of the fine of \$50 assessed against him for contempt. This he never did, but permitted him to go at large. Under the authorities, this was an escape. See 11 Am. & Eng. Enc. Law, p. 265, subd. 3; *Owens v. State*, 32 Tex. Cr. R. 373, 23 S. W. 988. True, as observed in the opinion, the writ of *habeas corpus* applies to every character of restraint. Still it occurs to me that, where a prisoner seeks to be discharged by the writ under a judgment and commitment of the court, he must show an actual commitment in accordance with the order. If he is merely at large, although under some species of constraint, I do not believe the writ will lie. The mandate of this court operates directly upon the officer holding the prisoner. *Ex parte Erwin*, 7 Tex. App. 288. In this case there was no officer holding the relator, and, in order to have confined the relator under the original commitment, I believe the officer would have had to obtain a new writ. He certainly would have been compelled to rearrest the relator under the former writ.

As to whether or not the court had the power to treat as contempt the conduct of the relator as set out in the judgment, I need only refer to my views expressed in the dissent in *Ex parte Duncan*, 42 Texas Crim. Rep. 661, 62 S. W. 758, 2 Tex. Ct. Rep. 402. The alleged contempt here was in the face of the court, and there is no question but that the court had jurisdiction of the person of the relator at the time. Did it have the power to treat the particular conduct of the relator on the occasion as contempt of court? I believe the language attributed to relator in the judgment was tantamount to telling the witness Beakley that he had lied. Of course, he did not intend to

apply this language to his own witness, and when he told the jury that Crawford (his own witness) or Beakley (who testified against him)—one or the other—was mistaken or had lied, it was meant for Beakley. When Beakley protested, relator turned toward him in an excited voice and manner, and, pointing and waving his hand toward said Beakley, repeated the accusation, and, in addition, stated that he had nothing to take back. All this transpired in the presence of the court, and the judge based his action on his own personal knowledge, not only as to the language used, but as to the manner of the relator. The judicial eye witnessed the act, the judicial mind comprehended all the circumstances of aggravation, provocation or mitigation, and I do not believe his judgment can be attacked by affidavits; nor does it require extraneous support in order to render it effective. That such language is calculated to provoke a breach of the peace, I have no doubt. At the same time, I would not be understood as curtailing the right of all legitimate debate. An attorney has at all times the right, and he should be untrammelled, to criticise the testimony of witnesses against him; but, if he would be severe, he must be parliamentary at the same time. I do not believe that it accords with the proprieties of the court-room to apply to a witness the epithet of liar or scoundrel, especially if, under the circumstances, this language is calculated to, and actually does, provoke a breach of the peace. But, however that may be, the court below had jurisdiction of the subject-matter of the contempt, and if the conduct of the relator as set out in the judgment could, under the circumstances, constitute a contempt of court, I do not believe it is competent for this tribunal to try the case *de novo*, and set aside the judgment on evidence contradicting the record.

IN RE KNOWLTON.

136 Cal. 107—68 Pac. Rep. 480.

Decided March 21, 1902.

HABEAS CORPUS to release convict under statutory good behavior provisions—Scope of the writ in such matter.

Under the statutes of California, a convict in the penitentiary, for good behavior, is entitled to a graded deduction in his term of imprisonment; but is liable to forfeit the same by acts of violence, misdemeanors or infractions of the prison rules, provided, that he has notice of the hearing of the matter by the board of prison directors. *Held:*

1. That if such forfeiture was made without a notice to the convict, he was entitled to the benefit of a writ of *habeas corpus*.
2. It appearing that a written charge was made to which the convict, upon notice, pleaded not guilty, and that a hearing was had thereon, the findings of the board could not be reviewed upon a writ of *habeas corpus*.

Supreme Court of California; In Banc.

Writ of *habeas corpus* to release a convict from the penitentiary, under the good behavior provision of the statutes. Writ discharged and prisoner remanded.

Frank J. Murphy, for the petitioner.

Tirey L. Ford, Attorney General, and *A. A. Moore, Jr.*, Deputy Attorney General, for the respondent.

HENSHAW, J. The writ in this case was issued upon petitioner's verified statement that, having been convicted of a felony and sentenced to serve a term in the State prison at San Quentin, he had, since his incarceration therein, faithfully obeyed and complied with the laws of the State and all the rules and regulations of the prison, and that, taking into consideration the credits for good conduct, to which he was entitled under the law, the term of his imprisonment had expired, and he was entitled to his discharge; that, notwithstanding this, he was unlawfully and illegally restrained of his liberty by the warden of the prison; that the only pretense or claim made by the warden for his conduct in this regard was

that "on or about the 14th day of January, 1899, the Board of Prison Directors of the State of California arbitrarily and without any notice to the said Knowlton, or to any other person, and without giving him an opportunity to be heard in his own defense, and without the filing or making of any charges against the said H. W. Knowlton, and without any proofs or any testimony that the said H. W. Knowlton was guilty of a violation of any of the rules or regulations of said prison, or any violation of the law, caused to be entered in the minutes of the said board of prison directors the following entry: 'George Knowlton, charged with smuggling money in prison, plead not guilty, found guilty, deprived of six months' credits.'" "George Knowlton" is the person who here petitions as Mayne Knowlton.

By section 20 of an act to regulate and govern the State prisons of California (St. 1889, p. 404) a convict is entitled to certain graded deductions from his term of imprisonment, based upon his good conduct and compliance with the laws of the State and the rules of the penal institution, and herein it is provided: "But if any convict shall commit any assault upon his keeper, or any foreman, officer, convict, or person, or otherwise endanger life, or shall be guilty of any flagrant disregard of the rules of the prison, or commit any misdemeanor, or in any manner violate any of the rules and regulations of the prison, he shall forfeit all deductions of time earned by him for good conduct before the commission of such offense, or that, under this section, he may earn in the future, or shall forfeit such part of such deductions as to the board of directors may seem just; such forfeiture, however, shall be made only by the board of directors after due proof of the offense and notice to the offender; nor shall any forfeiture be imposed when a party has violated any rule or rules without violence or evil intent, of which the directors shall be the sole judges."

This section requires that the board of directors, before they shall take action, shall have given notice to the offender, and heard proof touching the offense. The allegations of the petition above quoted were to the effect that the board had acted illegally, and in excess of its jurisdiction, in depriving the petitioner of a portion of his credits without the preferment of a charge, without notice to him, and without proof taken. Manifestly, upon such allegations, solemnly verified, the petitioner

was entitled to his hearing under the writ of *habeas corpus*, and the writ was ordered issued accordingly. Upon the return of the writ, and by the testimony taken at the hearing, it was, however, made to appear that a formal charge in writing had been preferred against the defendant; that he had been brought before the board to answer the charge, and had pleaded not guilty thereto; that evidence in support of the charge by the prison officials had been taken; and that the defendant had been given the opportunity to present counter evidence, if he saw fit. It was further shown that one of the prison rules and regulations prohibited prisoners from transmitting or receiving money to or from any person, without the consent of the warden first obtained. It is not the province of this court under the writ of *habeas corpus* to review the sufficiency of the evidence upon which the board of directors acted in reaching its determination as to the guilt of the petitioner. It is sufficient when it is shown, as here it has been shown, that after a regular hearing of charges, regularly preferred, with due notice to the convict to appear, and sufficient opportunity to him to present his defense, he has been found guilty of violating a recognized and proper rule of the institution.

The writ is therefore discharged, and the prisoner remanded.

We concur: BEATTY, C. J.; MCFARLAND, J.; GAROUTTE, J.; VAN DYKE, J.; TEMPLE, J.

STATE v. HOUGHTON.

43 Ore. 125—71 Pac. Rep. 982.

Decided March 30, 1903.

HEARSAY EVIDENCE: *Testimony of detective that the prosecuting witness recognized the defendant's picture in the rogue's gallery—This error not cured by the prosecutor's testimony—Other crimes—Error in proving that defendant's picture was in the rogue's gallery, and also in interrogating the defendant as to the supposed cause of his picture being there.*

1. It was error to permit a detective to testify, that on the morning after the robbery in question, the prosecuting witness described his assailant and said that he could recognize him, and that thereupon, on being shown the rogue's gallery, he picked out the picture of the defendant; such testimony being hearsay

and incompetent; nor, was this error harmless, for it brought to the attention of the jury the fact that the defendant's picture was in the rogue's gallery, presumably because he had committed some other crime or was regarded by the police as a common criminal; nor was this error rendered harmless by the fact that the prosecuting witness testified without objection that he recognized the picture the morning after the robbery in the rogue's gallery.

2. The defendant having testified as a witness in his own behalf, as to how his picture came into the rogue's gallery, the detective was recalled, and, testified that the picture was there because the defendant had committed a crime. *Held*, reversible error.
3. It was error to examine the defendant as to the commission of other supposed crimes.

Supreme Court of Oregon.

Appeal from Circuit Court, Multnomah County; Hon. Arthur L. Frazer, Judge.

Charles Houghton, convicted of assault, with intent to commit robbery, appeals. *Reversed*.

W. T. Hume and *Charles F. Lord*, for the appellant.

John Manning, District Attorney, and *Arthur C. Spencer*, for the State.

BEAN, J. The defendant was charged with the crime of robbery from the person of one Balch, by assault and putting in fear, and upon his trial was convicted of an assault with intent to rob. Balch was assaulted by three men and robbed of a check for \$7 and \$20 to \$25 in money, about 11 o'clock on the night of November 7, 1902, on a street in the "North End" of the city of Portland. A short time before the robbery he was in the Mint saloon, and while there received change for a twenty-dollar gold piece. Several persons, strangers to him, were in the saloon at the time, one of whom he testifies was the defendant. After receiving his change he went out on the street, where he was accosted, as he says, by the defendant, who inquired if he was a stranger in town, and, receiving an answer in the affirmative, said that he was also a stranger, and suggested that they walk around and see the town together. They soon after started, and had gone but a short distance when two persons suddenly stepped out in front of them, and, with the aid of defendant, as Balch testifies, committed the robbery. Balch immediately reported the crime to the police.

At the trial he testified, without objection, that the morning after the robbery he recognized a photograph of the defendant at the police station as being that of one of the persons engaged in the commission of the crime. Joseph Day was thereupon called as a witness for the prosecution, and, after testifying that he was a member of the detective force, detailed to inquire into the commission of this particular offense, stated that Balch described to him one of the men engaged in its commission, and said that he would know him if he saw him; that he asked Balch if he thought he would recognize the picture of the man, and took down the book belonging to the office, containing photographs of sundry persons. Objection was made to this testimony because it was hearsay, but the objection was overruled, and the witness continued: "I took down the book, and turned over, page by page, from A, B, C, all through, and let him look at the pictures, and he came to Houghton's picture, and he said, 'That is the man.'" A motion was thereupon made to strike out this evidence, and the District Attorney remarked that he had no objection. The court, however, ruled that it might be stricken out if the District Attorney consented, but that, in its opinion, it was competent. Exception was taken to the ruling as to the competency of the testimony, when the court remarked: "I think the fact that he was able to pick out his picture is material evidence in this case." The motion to strike out was renewed and overruled.

The defendant, testifying in his own behalf, among other things, in response to questions of his counsel, said that his picture had been taken and was at the station because he would not act as a "stool pigeon" for Detective Day; that he was walking along the street one day, when the detective seized him, took him to the station, and had his picture taken, without any charge having been preferred against him. On cross-examination he was asked: "You say that Joe Day just walked out on the street, and run you into the station, and took your photograph in the gallery? A. That is exactly what he did. Q. I will ask you if it is not a fact, and that you know it, that the reason that picture was taken was because you held up a man at the point of a gun, and another man robbed him, and you ran up into a house and jumped out of the window, and as soon as they arrested you they had your photograph taken?" Objection was made to this question, and the court

requested to instruct the jury to disregard it, but the request was denied, and the examination proceeded: "Q. I will ask you if it is not a fact that you saw Joe Day in Seattle, near the corner of Second avenue and Yesler street, and when you saw him you ran and hid in a stairway? A. No; I did not. Q. You did not see him over there at all? No, sir; I did not. Why should I run from him? Q. Probably you know. * * * You did not resist the taking of that picture, did you? A. Yes; I did. I told them they had no right to take that picture; I was not arrested for nothing; that I could not walk down the street; it was a funny thing, when I was not arrested, that I could not turn a corner but what Joe Day was near at hand." Objection was made to this question, but overruled by the court. "Q. You know that a little while before that you had stolen \$200?" An objection was sustained to this question, but the witness answered, "It ain't so;" and upon motion this was stricken out, and the jury instructed to disregard it. Day was subsequently called in rebuttal, and was interrogated by the District Attorney and answered as follows: "You heard the explanation of Houghton about taking his picture? A. Yes; I did. Q. I wish you would explain the circumstances of taking that picture." The question was objected to because it was irrelevant and immaterial, but the objection was overruled, and the examination proceeded: "Q. State whether or not the picture was taken because of any robbery or crime the defendant, Houghton, had committed. A. Yes. Q. What was the crime he had committed?" Objection was made to the last question, and it was not insisted upon by the District Attorney.

1. The admission of the testimony of Detective Day that the prosecuting witness, Balch, the morning after the robbery, identified the photograph of the defendant in the rogues' gallery at the police station as that of one of the parties engaged in the commission of the crime, the admission of the testimony as to when and under what circumstances the defendant's photograph was taken, and the ruling of the court on his cross-examination in reference thereto, are all made the basis of separate assignments of error. Without noticing the assignments in detail, however, it is clear that they are of such a character as to require a reversal of the judgment. The testimony that Balch identified the defendant's photograph as that of one of

the guilty parties was mere hearsay, and, under the circumstances, prejudicial to the defendant. The crime for which he was being tried was committed at night, and, as he was a stranger to the prosecuting witness, an important and material question in the case was whether Balch was able to identify him as one of the guilty parties. The fact that the next morning Balch was shown by the detective a photograph of the defendant, and identified it as a picture of one of the parties concerned in the commission of the crime, was damaging testimony, in view of the ruling of the court that it "was material evidence in the case." It amounted to nothing more than an identification or description of the culprit, and, as it was not in the presence of the defendant, was hearsay evidence and incompetent. This is in accordance with oft-repeated holdings of the courts. Thus, in *People v. Johnson*, 91 Cal. 265, 27 Pac. 663, and *People v. McNamara*, 94 Cal. 509, 29 Pac. 953, the testimony of an officer as to the description of the culprit given him by the prosecuting witness before the arrest in each instance was held to be hearsay, and its admission prejudicial error, for which the cases were reversed. Again, in *Murphy, alias Jones v. State*, 41 Tex. Cr. R. 120 (51 S. W. 940), it was held that on a trial for murder it was incompetent and inadmissible, as original evidence, to prove by a witness who was present at the killing, and only saw defendant for an instant at that time, that subsequently she picked him out and identified him at the jail, among several other inmates, as the person who committed the murder. So, also, in *Commonwealth v. Fagan*, 108 Mass. 471, evidence that the person who was robbed described the robber to the officer, and that the officer thereupon went in search of the defendant, was held hearsay, and not admissible to identify the robber with the defendant. And in *O'Toole v. State*, 105 Wis. 18 (80 N. W. 915), a case somewhat similar to the one at bar—two policemen testified to the effect that the prosecuting witness on the day after the robbery stated that plaintiff in error was the man who committed it; but the court held the admission of such testimony error, saying: "It was placing before the jury an unsworn declaration under circumstances likely to give it great weight. The darkness and confusion surrounding the robbery justified an argument upon the improbability of the prosecutor's ability to have seen his assailant sufficiently to identify

him, and the declaration of defendant's identity when presented among others before complainant must be weighed with the jury upon the facts so declared, and therefore prejudiced the accused. Error was thus committed for which the judgment must be reversed." The admission of the testimony that the prosecuting witness recognized defendant's photograph at the police station the morning after the robbery as that of one of the parties engaged in its commission was, therefore, error.

2. Nor was the error harmless, as it brought prominently before the jury the fact that the defendant's picture was in the rogues' gallery, presumably because of the commission of other crimes by him, or because he was regarded by the police as a common criminal, which, in connection with the nature of his subsequent cross-examination, practically amounted to an attack on his general character.

3. In addition to this, the testimony concerning the commission by him of other distinct crimes was in no way connected with that for which he was on trial, thus violating a universal rule of law.

4. Neither was this error cured by Balch's testimony, admitted without objection. Balch did not go into details, and his evidence on this subject could perhaps be regarded only as a circumstance attending the search for the guilty parties. When Day was called, however, the entire matter was gone into, over the objection of the defendant and under the ruling of the court that such evidence was material testimony against him.

As these views require a reversal of the judgment, it is perhaps unnecessary to consider whether the crime of which the defendant was convicted was included in the one charged in the information; but it is difficult to understand how robbery from the person by assault and putting in fear could be committed without an assault with an intent to rob.

The judgment is reversed, and a new trial ordered.

Reversed.

DONNER V. STATE.

69 Neb. 56—95 N. W. Rep. 40.

Decided May, 20, 1903.

HEARSAY TESTIMONY: *Shipment of stolen property—Incompetent testimony as to book entries not made by the witness.*

1. Ordinarily hearsay testimony is inadmissible.
2. What the law requires is the production of original evidence—the best evidence obtainable—secondary evidence being admissible only when for some reason primary evidence cannot be secured.
3. A witness is not permitted to state what appears from books or records where it is shown that the books were not kept by the witness, nor the entries made by him, nor in his presence; such statements being merely hearsay testimony.
4. Testimony of a witness for the prosecution of the case at bar, admitted over the objections of the defendant, which is set out in the opinion, examined, and held to be hearsay testimony, and its admission prejudicially erroneous.
(Syllabus by the Court.)

Supreme Court of Nebraska.

Error to District Court, Antelope County; Hon. James F. Boyd, Judge.

Frank Donner, convicted of larceny, brings error. Reversed.

Norman D. Jackson, O. A. Williams, H. C. Brome and A. H. Burnett, for the plaintiff in error.

F. N. Prout, Attorney General, and *Norris Brown*, for the State.

HOLCOMB, J. The defendant in the trial court, who comes here by proceedings in error, was informed against, and by a jury found guilty of the larceny of two head of cattle, of the value of \$45. After overruling a motion for a new trial, the trial court pronounced sentence of imprisonment in the penitentiary for a period of four years, to secure a reversal of which is the object of the present proceedings.

The errors assigned which are relied on and argued by counsel for the accused relate to the rulings of the trial court in the

admission of certain testimony over objections of the defendant, which it is contended was hearsay testimony, and therefore incompetent. The cattle alleged to have been stolen by the accused were found to be missing from a pasture containing a large number kept there during the grazing season. The prosecution by the State was conducted on the theory that the accused took those mentioned in the information, with others, from the pasture, and, with his own cattle, drove them to Oakdale, a railway station near by, where he shipped the bunch (being a carload) to the South Omaha market, and there disposed of them through a firm of commission merchants operating at that place. The evidence is conclusive to the effect that the defendant, at about the time of the alleged larceny, shipped, in the name of the Antelope County Bank, doing business at Oakdale, a carload of cattle to Shelley, Rogers & Co., at South Omaha. Whether the stolen cattle were in fact included in the shipment thus made by the accused depended upon the evidence of witnesses who were qualified to testify to the receipt of the cattle at the stockyards, and identify the carload coming from Oakdale as the consignment made by the bank, at the instance of the accused, to Shelley, Rogers & Co. There appears to have been no evidence obtainable by which the stolen cattle could be identified as being in the possession of the accused at the time or prior to the shipment of the carload from Oakdale. On this point it is the contention of counsel for the accused that the only evidence tending to prove that the cattle alleged to have been stolen were a part of the carload consigned by the bank at Oakdale to the commission merchants at South Omaha was hearsay, and for that reason incompetent, and because thereof the verdict of guilty cannot be sustained. The testimony of this character admitted over objections by the defendant, which is especially urged as being erroneous, is found in the testimony of a certain witness, named Jones, who was assistant weighmaster of the stockyards of South Omaha. After testifying that he was receiving and weighing stock on the 17th of July at South Omaha (this being the day after the accused shipped the car of cattle from Oakdale), the witness was asked: "Q. You may state if on that date you received and weighed a consignment of stock from the Antelope County Bank to Shelley, Rogers & Co.?" Before the answer of the question was allowed, the witness was cross-examined as to his

competency to testify as to the facts inquired about, in which it was disclosed that his only knowledge regarding the cattle he was testifying about being shipped by the Antelope County Bank, or having come in a car from that place, was from information received from other employes of the stockyards; that the first knowledge he had of the cattle was when he found them in a particular inclosure after being unloaded, and from the records kept by the stockyards company and by other employes, he learned where they came from, who the consignor of the load was, and to whom they were consigned. Objection was made to the witness answering the question put by the State, because it appeared that his testimony was hearsay and incompetent. The objection was overruled, and exception taken, and the witness' answer to the question was, "I did." He was then permitted to testify what he did with the particular bunch of cattle purporting to have been consigned by the Antelope County Bank to Shelley, Rogers & Co., into what yard or pen he turned them, and in whose charge they were placed. The bunch of cattle thus identified as coming from the accused was then traced into the hands of the consignees, Shelley, Rogers & Co., and from them to others, where they were afterwards found and identified by the owner and others as the cattle which had been stolen from the pasture in Antelope County where they had been kept. On cross-examination, the witness Jones was asked: "Q. Where did you get your information from, when you say you received a consignment of cattle? A. From the car number and consignee and consignor. Then it is turned over to me. I take the bunch out and count it. Q. That is the one source of your information? A. That is the one way I know of by. Q. That is the only source of the information of the fact you have testified to? A. I took the car number from the books furnished me. Then I counted them out of the chutes, and turned them over to an employe of the company. Q. And your information comes from the books kept by some one? A. Yes, sir."

The defendant thereupon moved the court to strike out the testimony of the witness, because hearsay, and based upon certain books that have not been received in evidence, and incompetent and immaterial. The objection was overruled, and exceptions taken. There is no other evidence in the record connecting the bunch of stock received at South Omaha, in

which the stolen cattle were found, with the shipment made by the bank for the accused, except that which we have just quoted. The testimony of other witnesses identifying the stolen stock found in South Omaha must necessarily, so far as its connection with the accused is concerned, rest on the testimony of the witness Jones, to the effect that the cattle afterwards identified as being stolen were a part of the carload shipped by the defendant's order at the time stated. Whether the assistant weighmaster should be permitted to testify that the bunch of cattle he identified were those included in the consignment made by the Antelope County Bank to Shelley, Rogers & Co. was of the most vital importance in determining the question of the guilt or innocence of the defendant. The State's case rested almost entirely on its ability to identify the stolen cattle after they reached South Omaha as being those included in the carload shipped from Oakdale by the bank at the request of the accused. The testimony was manifestly hearsay, and regarding a matter that vitally affected the most essential fact to be established, viz., the possession by the defendant of the stolen property. The State having proven that the defendant had shipped, through the Antelope County Bank, as his own, and asserting ownership over them, a carload of cattle to Shelley, Rogers & Co., competent proof that the stolen cattle were a part of the shipment would be, under the circumstances, such strong evidence of guilt as to warrant the jury in finding the accused committed the larceny. The witness Jones, although he had no personal knowledge of the fact, was permitted to testify that the bunch of cattle which he found in a certain chute in the stockyards was the carload of cattle consigned by the bank to Shelley, Rogers & Co. Then by other witnesses it was proven to the satisfaction of the jury that in the bunch were the two stolen cattle, and thus possession of the stolen property was traced to the accused. The only knowledge the witness had as to where the cattle came from, in what car they were shipped, by whom consigned, and to whom consigned, was derived from the records and books of the stockyards company. He did not see, nor have personal knowledge of, what car these particular cattle were taken from when they were unloaded. His testimony in that regard was not original. It was not the best evidence. It was, in legal contemplation the same as though some third party had told the witness that

the bunch of cattle he was testifying about came in a certain numbered car, and was the shipment made by the Bank of Oakdale to the consignees in South Omaha. The person unloading the car which was used by the accused in shipping the cattle from Oakdale to South Omaha was not offered as a witness. There was nothing to show who made the entries in the book from which the witness obtained his information, when they were made, or under what circumstances; nor was the absence of the person who made the entries attempted to be accounted for in any way. It is elementary that, as a general rule, hearsay evidence is inadmissible. It is true there are certain well-recognized exceptions to the rule, but we are aware of none which would authorize the admission of testimony of the kind given by Mr. Jones, as coming within any of the recognized exceptions. What the law requires is, the production of original evidence—the best evidence obtainable—secondary evidence being admissible only when for some reason primary evidence cannot be secured. Wharton's Criminal Evidence (8th ed), Sec. 220; *Ponca v. Crawford*, 23 Neb. 662, 37 N. W. 609, 8 Am. St. Rep. 144; *Bennett v. McDonald*, 59 Neb. 234, 80 N. W. 826. In *Traver v. Hicks*, 131 Mo. 180, 32 S. W. 1145, it is said that while a witness may refresh his memory from memoranda made by himself at or near the time of the transaction, he may not do so from those made by others, and as to the facts of which he has no personal knowledge. Statements by a witness as to what appears from books or records, where it is shown that the books were not kept by the witness, nor the entries made by him, nor in his presence, are nothing more than hearsay testimony. *Young v. Miles*, 20 Wis. 646. To the same effect are *Thomas v. Woodruff*, 53 N. Y. Super. Ct. 327; *Gulf, C. & S. F. Ry. Co. v. Frost* (Tex. Civ. App.) 34 S. W. 167; *McCornick v. Sadler*, 10 Utah 210, 37 Pac. 332; *Hibbard v. Mills*, 46 Vt. 243. Although loath to interfere with the judgment of the trial court in this case, we cannot escape the conclusion that the verdict of guilty as found by the jury, cannot be sustained without ignoring and violating fundamental principles of the law of evidence.

The record disclosing, as it undubitably does, prejudicial error in the admission of the testimony referred to, over the objections of the defendant, the verdict and sentence must be

set aside, and a new trial awarded. The judgment of the trial court is reversed, and the cause remanded for further proceedings in conformity with law. Reversed and remanded.

STATE v. POLHEMUS.

65 N. J. Law, 387—47 Atl. Rep. 470.

Decided November 12, 1900.

IMPEACHMENT OF WITNESS: *Method of interrogating an impeaching witness—Reputation the basis for belief of an impeaching witness—Practice—Errors waived by not being raised in the court below.*

1. The record fails to show an order by which an indictment found at the Oyer should be tried at the Sessions; but, if such is an irregularity, it does not affect the merits of the defense, and not being raised in the court below cannot avail.
2. After an impeaching witness has testified that the general reputation of the person sought to be impeached is bad, he may be asked whether from such reputation he would believe that person under oath; but it is reversible error to ask the impeaching witness in the first instance, whether he would believe the person under oath.

Supreme Court of New Jersey.

Error to Cumberland, Quarter Sessions.

William Polhemus, convicted of grand larceny, appeals.
Reversed.

Argued June term, 1900, before DEPUE, C. J., and GUMMERE, LUDLOW, and FORT, JJ.

Walter H. Bacon, for the plaintiff in error.

J. Hampton Pithian, for the defendant in error.

GUMMERE, J. At a trial which took place before the Court of Quarter Sessions of the County of Cumberland, the defendant was convicted of the crime of grand larceny, and the first ground upon which we are asked to set the conviction aside is that, although the case was tried in the Sessions, the indictment was found in the Oyer, and that no order of the latter court sending the case down appears in the record.

Assuming that the procedure was irregular for want of such an order, an objection on that ground, to be effective, should have been taken at the trial of the case. This was not done and it is now too late to take advantage of it. "The irregularity, if such it be, is one of those imperfections not affecting the merits of the defense, for which a judgment given upon an indictment may not be reversed." *Winters v. State*, 61 N. J. Law, (32 Vroom) 613, 41 Atl. 220.

The second error assigned relates to the admission of testimony, introduced by the State, for the purpose of impeaching the evidence of one Camp, a material witness produced on behalf of the defendant. The impeaching witness was first asked: "Do you know the reputation of that witness (Camp) for truth and veracity?" To this question he answered: "Yes, sir." He was then asked: "Would you or would you not believe him upon his oath?" This was objected to by the defense as improper, but the witness was permitted to answer the question, and replied: "No, sir; I would not like to."

The usual mode pursued in an examination of this kind is, first, to inquire if the impeaching witness possesses knowledge of the reputation of him whose testimony is sought to be impeached, for truth and veracity, in the neighborhood where the latter resides. If he does, then he should be asked to state what that reputation is; and, if he answers that it is bad, he may then be asked if, from his knowledge of such reputation, he would believe the impeached witness under oath. The propriety of permitting a witness to express his own opinion of the truthfulness of him whose testimony is sought to be impeached, even when that opinion is based upon the latter's general reputation, has been questioned by the courts of some of our sister States, but the great weight of authority is in favor of allowing it. In order, however, to be competent, an opinion expressed must be based upon the general reputation of the impeached witness for truth and veracity, and not upon personal dealings with him. Although every man is supposed to be capable of supporting his reputation for truthfulness whenever it is attacked, it would be almost impossible for him to be prepared to show, without previous notice, that the opinion of any particular person, of his worthiness of belief, when based upon personal transactions with him, was not in fact justified by those transactions.

In the case before us, not only was the opinion of the impeaching witness not based upon Camp's general reputation for truth and veracity, but it does not even appear what that reputation was. It may very well be (so far as the case shows) that it was irreproachable in the neighborhood where Camp lived, and that the opinion of the impeaching witness was based entirely upon the personal relations of the two. The testimony objected to was improperly admitted, and it was undoubtedly injurious to the defendant's case. For this reason, the conviction must be set aside.

As a new trial must follow the reversal of this conviction, we have examined the other alleged errors which have been assigned by the defendant, in order that if these points were, any of them, of substance, the errors might be avoided at the retrial of the case. Our examination, however, has failed to disclose any error except that which I have already pointed out.

The judgment under review will be reversed, and the case remitted to the Court of Quarter Sessions for a trial *de novo*.

GLOVER v. STATE.

114 Ga. 828—40 S. E. Rep. 993.

Decided March 10, 1902.

IDENTIFICATION: *Evidence of identity should be as strong as that of the corpus delicti—Dissenting opinion as on the facts.*

The evidence being insufficient to establish beyond a reasonable doubt that the accused was the person who committed the crime which was shown to have been perpetrated, the verdict of guilty cannot be lawfully upheld. It is as much incumbent upon the State to identify the accused as the perpetrator of the offense with the requisite degree of certainty as to prove the *corpus delicti*.

LEWIS, J., dissenting.

(Syllabus by the Court.)

Supreme Court of Georgia.

Error to Superior Court, Bibb County; W. H. Felton, Jr., Judge.

Henry Glover, convicted of burglary, brings error. Reversed.

W. F. Blue and John R. Cooper, for the plaintiff in error.
Wm. Brunson, Solicitor General, for the State.
PER CURIAM. Reversed.

LEWIS, J. (dissenting). The evidence, in my opinion, was sufficient to identify the accused as the perpetrator of the crime. At the November term, 1901, of Bibb Superior Court, Glover was brought to trial upon an indictment charging him with the offense of burglary. The jury returned a verdict of guilty, and he thereupon made a motion for a new trial, which was overruled, and he excepted. The controlling question in the case is whether or not the evidence upon which the State relied for a conviction was sufficient to sustain the jury's finding. Four of the members of this court entertain the view that it was not, while I am of the contrary opinion. It was shown at the trial that, as charged in the indictment, the house of L. A. Braswell had on the morning of the 24th of October, 1901, been burglariously entered, and the sum of two dollars and a quarter in silver money taken therefrom. The only question really at issue was whether or not the accused was the person who had committed the offense. The State introduced as a witness Mrs. Braswell, who testified, in substance, as follows: "Some one entered the house through a window in my room. The opening of the window did not awake me, but I woke apparently out of a sound sleep; the light being out first attracting my attention. My little one was very sick with the croup, and I decided that I would get up and give him some medicine. I thought Mr. Braswell had blown out the lamp. It was in one corner of my room, opposite my bed, on the dresser, and I had to go by the bed to the dresser. The matches were under my pillow at my head, and I struck one just as I got off the bed. I stepped on something, and when I did I knew it was some one. I discovered it was some one lying right at the foot of my bed, and I looked to see if it was any one who belonged to the house. He pulled my dress from over the foot of my bed, and wrapped up his head so that I could not see his face and hands; but I think he was a very chunky negro, and I have always believed he (the accused) was the negro, from the description and by the way he was lying. I did not see his hands. I saw his clothing good. I think I could identify that clothing. I think he is the

negro. I believe I would be willing to swear they are the same clothing. They were checked pants. I could not exactly say, but they looked very much like the clothes he has on. * * * I stepped on him at the same time I struck a match. I lit the lamp, and was screaming all the time. I saw him get out of the window. He lay right there till I lit the lamp. He had his head wrapped up in one of my dresses. I saw him from his chest down. I saw his clothes and pants and socks good. He had on a pair of new-looking socks, very dusty, and the prints of his shoes on them. He didn't have on any shoes. I stopped and looked at him while I had the match in my hand. I do not think I struck but one. The negro went out the window he came through. He carried my skirt with him, and threw it back as he went out of the window." This occurred about half past 12 or 1 o'clock.

It appeared from the testimony of Braswell that, being awakened by the screams of his wife, he ran from the room which he was occupying into her room, in order to find out what was the matter, but was not in time to see the alleged burglar. After daylight, however, he made an examination of the premises for the purpose of finding tracks, and discovered the track of a man who "was in his sock feet." This track led out in the direction of Mr. Hudson's, a neighbor, and was followed for 50 yards, and then lost, owing to the fact that from that point on the ground was so hard that no impression of footprints upon it was discernible. Hudson's house had also been broken into, and he and Braswell followed a track which led from there down a road; the footprints being such as to indicate that the person making them was running at the time. The accused was suspected of being the guilty party, and they then went to a store where he was employed, and Braswell "asked him to come outside, and pull off his shoe and make a track, and he did so." "In the heel there was a rumple in the sock, which caused it to make a V shape," and this peculiarity was noticeable in the tracks which had been made around Braswell's house. In this connection, Hudson testified: "I went with Mr. Braswell at the time this man was arrested, and saw him make a track. There was a crease in his sock that I particularly noticed was in the track that he made at Mr. Braswell's house. It was in a kind of V shape—a wrinkle in the sock heel. That was the

way that we identified the negro. We had the boy to take the shoe off the right foot. That was the track that had the peculiar crease in the sock heel. He had on common, black-looking socks, and very dusty. The shoe we took off was unsound and ragged." There was further testimony to the effect that on the occasion just referred to the accused was asked "where he was the night before, and he said in town, except about an hour and a half; that he brought Ralph Hutchin's daughters" home from a carnival which was being held in Macon, and about half past 11 came back to town, and "was not in that neighborhood all that night." The accused was thereupon carried before the girls to whom he referred, and "they denied seeing him at all that night." At the trial one of them was introduced as a witness, and testified that she "did not come to the carnival," but remained at home, and "did not see the defendant at all that night." From the foregoing it will be seen that the State established by direct and positive evidence that a burglary had been committed as charged in the indictment, and also introduced testimony strongly pointing to the accused as the guilty person. The evidence bearing upon the question of identity was, it is true, purely circumstantial; but it was, in my opinion, sufficient to warrant a conviction. The trial judge, in charging the jury with regard to this branch of the case, fully and fairly instructed them as to the law of reasonable doubt, and carefully explained to them the nature of circumstantial evidence, and how they were to weigh the same in arriving at their conclusion as to the guilt or innocence of the accused. The verdict not being without evidence to support it, and having met the approval of the presiding judge, I feel constrained to dissent from the judgment of my Brethren setting it aside.

BROWN v. STATE.

LEONARD (D. M.) v. STATE.

LEONARD (E. A.) v. STATE.

116 Ga. 559—42 S. E. Rep. 795.

Decided November 12, 1902.

INDICTMENT: *Insufficient description of alleged stolen property—Statute declaring indictments in the terms of the statute sufficient no excuse for vagueness in matters of description—Practice—Exceptions pendente lite.*

1. A judgment overruling a demurrer to an indictment may be made the subject of exceptions *pendente lite*, and error may be assigned on such exceptions in a bill of exceptions sued out in due time, complaining of the final judgment in the case. In the case of *Banks v. State*, 39 S. E. 947, 114 Ga. 115, there were no exceptions *pendente lite*.
2. An indictment charging the accused with the offense of receiving stolen goods, in that after "a certain lot of brass, to-wit, five thousand pounds," had been stolen, the accused received the same, "to-wit, certain lot of brass fittings, to-wit, four hundred pounds, of the value of three hundred dollars," knowing the same to have been stolen by the person from whom received, should have been held bad on special demurrer raising the objection that the allegations as to the articles received were not sufficiently specific; the description not being sufficient to identify the articles alleged to have been received, nor to put the accused on notice of the charge he was to meet.

(Syllabus by the Court.)

3. The section of the Penal Code which provides that an indictment which states the offense in the terms and language of the Code or plainly that its nature may be easily understood by the jury, "was not intended to dispense with the substance of good pleading, nor to deny to one accused of crime the right to know enough of the particular facts constituting the alleged offense to have an indictment perfect as to the essential elements of the crime charged." (Additional syllabus by J. F. G.)*

Supreme Court of Georgia.

Error to Superior Court, Chatham County; Hon. Pope Barrow, Judge.

*For review of authorities on this proposition, see 11 American Criminal Reports, 506 to 518.

Richard Brown, D. M. Leonard, and E. A. Leonard were convicted of receiving stolen goods. They bring error. Reversed.

Robert L. Colding, for the plaintiffs in error.

W. W. Osborne, Solicitor General, for the State.

COBB, J. Brown and the Leonards were indicted for receiving stolen goods. They were convicted, and complain that the Court erred in overruling a demurrer to the indictment, as well as in refusing to grant them a new trial.

1. The demurrer was overruled on June 25, 1902. Exceptions *pendente lite* complaining of this ruling were certified and entered of record on July 17, 1902, during the term at which the ruling was made. The motion for a new trial was August 13, 1902. The bill of exceptions complaining of the latter ruling, and also assigning error on the exceptions *pendente lite*, was tendered within twenty days from the date last mentioned, and was duly certified. The law allowing exceptions *pendente lite* applies in criminal cases, and the exceptions in the present case were certified in due time. See *Strickland v. State*, 115 Ga. 222, 41 S. E. 713. In *Banks v. State*, 114 Ga. 115, 39 S. E. 947, there were no exceptions *pendente lite*.

2. The indictment charged that one Charles Kimball had been lawfully convicted of a burglary of the storehouse of Rourke & Sons, a firm composed of named persons, and that he "did steal from said storehouse of said firm a certain lot of brass, to-wit, five thousand pounds, the property of said firm," and that the accused, "well knowing said personal property to have been stolen and feloniously taken as aforesaid, did then and there receive same of and from the said Charles Kimball, to-wit, certain lot of brass fittings, to-wit, four hundred pounds, of the value of three hundred dollars, the property of said firm, contrary to the laws," etc. The demurrer raises the objection that that part of the indictment describing the articles alleged to have been received is not sufficiently specific; that it does not identify the articles, and does not put the accused on notice of the charge they are called on to defend. All that is necessary to show that the term "fitting" is very general and comprehensive is to look at the definition

of the same in some of the standard lexicons. A "fitting" has been defined to be: "Anything used in fitting up; especially (pl.) necessary fixtures or apparatus; as, the fittings of a church or study; gas fittings." Webster's Int. Dict. It has also been defined as "anything employed in fitting up permanently; used generally in the plural in the sense of fixtures, tackle, apparatus, equipment; as the fittings of an office; gas fittings." Century Dict. It will not be contended, we suppose, that an indictment for larceny, describing the articles stolen as a certain lot of fittings, of a given weight and value, would be sufficient as against a special demurrer. *Walshour v. State*, 114 Ga. 75, 39 S. E. 872. Does the mere addition of the material of which the fittings are made make the description sufficient? Is one charged with having received stolen goods, in that he received a "certain lot of brass fittings," of a given weight and value, informed by such averment of the charge he is to meet? Is there anything in such a description to enable him to prepare his defense? Are the articles referred to the brass fittings of a church, or a dwelling, or a ship, or a railroad car, or a buggy, or a carriage, or a bicycle, or an engine? Almost any article of a durable nature may have about it brass fittings. Brass fittings embrace numerous articles, large and small, of various kinds and descriptions, and used for many purposes. An indictment for receiving such articles, knowing them to have been stolen, should be sufficiently specific to reasonably identify the articles alleged to have been so received. In *Walshour v. State*, *supra*, Mr. Justice Little quotes approvingly the following from Mr. Bishop: "The description should be simply such as, in connection with the other allegations, will affirmatively show the defendant to be guilty, will reasonably inform him of the instance meant, and put him in a position to make the needful preparations to meet the charge." He also quotes with similar approval the following from Mr. Wharton: "There must be such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded."

One reason for requiring the description to be definite is that otherwise the accused would not be able to plead the judgment as a bar to another indictment. See 12 Enc. Pl. & Prac. 979. See, also, the other cases and authorities cited

in the *Wallhour Case*. While the description in the present case is not as general and indefinite as that in the *Wallhour Case*, and that case is therefore not absolutely controlling, we think the principle of that decision requires a holding in the present case that the description was fatally defective for the reason that there was nothing therein by which any article or number of articles could have been identified with any reasonable degree of certainty. If the language of that part of the indictment under discussion had been followed by the words "consisting of oil cups, globe valves, injectors, drainers, gauge cocks, siphons, lubricators, piping, return bends, steam gauges, inspirators," it might have been sufficient to have put the accused on notice of the articles they were alleged to have received. See, in this connection, *Cody v. State*, 100 Ga. 105, 28 S. E. 106. But it is certain that an allegation that the articles received were "brass fittings" of a given weight and value would not have accomplished this purpose. Let us assume that the accused are entirely innocent—(and of course, this must always be done in passing upon the sufficiency of an indictment); at what a loss would an innocent man be in the preparation of his defense, when he is called on to meet the charge simply that he received, knowing them to have been stolen, four hundred pounds of brass fittings, of the value of three hundred dollars. No person could thoroughly prepare to meet such a vague and indefinite charge. While the Penal Code (§ 929), provides that an indictment shall be deemed sufficiently technical and correct which states the offense in the terms and language of the Code, or so plainly that the nature of the offense charged may be easily understood by the jury, it has been more than once held that "this section was not intended to dispense with the substance of good pleading, nor to deny to one accused of crime the right to know enough of the particular facts constituting the alleged offense to be able to prepare for trial, nor to deprive him of the right to have an indictment perfect as to the essential elements of the crime charged." See *O'Brien v. State*, 109 Ga. 51, 53, 35 S. E. 112, and cases cited. The criminal pleader should always avoid unnecessary allegations which are descriptive of the offense, but at the same time he should be careful to make the descriptive averments sufficiently definite and certain to

put the accused on notice of the charge he is to meet. The court erred in overruling the demurrer.

Judgment reversed. All the justices concurring, except Lumpkin, P. J., absent on account of sickness, and Candler, J., not presiding.

TOWNE ET AL. v. PEOPLE.

89 Ill. App. 258.

Opinion filed May 10, 1900.

INDICTMENT—VARIANCE—OTHER CRIMES—INDETERMINATE SENTENCE STATUTE—BILL OF PARTICULARS—VERDICT—PRACTICE: *Rule for indictments for statutory crimes—Indictment of seven counts for conspiracy; three counts insufficient and three counts at variance with the evidence; conviction, as to the remaining count, reversed because of improper evidence admitted as to other crimes and on construction of the Indeterminate Sentence Statute—Practice as to Bills of Particulars.*

1. *Indictments—For Statutory Offenses, sufficiency of:* The rule that it is sufficient to charge a statutory offense in the language of the statute, is subject to qualification. Whether in any case it is enough that the indictment is merely framed in the words of the statute, must depend upon whether the words of the statute so particularize the offense as by their uses alone to notify the accused of the precise offense charged upon him.
2. *Same—Where the Words of the Statute are sufficient:* It is sufficient to frame an indictment in the words of the statute in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense he is to be tried for really is.
3. *Statutory Offenses—Sufficiency of the Indictment:* It is no more allowable under a statutory charge, to put a defendant on trial without a specification of the offense, than it would be under a common law charge.
4. *Same—Indictments for—Construction of the Statute:* Section 403 of the Criminal Code, providing that every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states in the terms and language of the statute creating offense, or so plainly that the nature of the offense may be easily understood by the jury, relates to matters of form and not to the substantial requirements of the indictment.
5. *Statutes—Sufficiency of Indictment Under:* Where the language

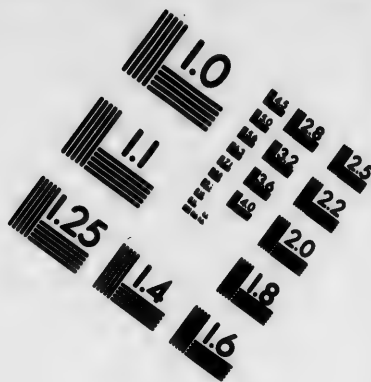
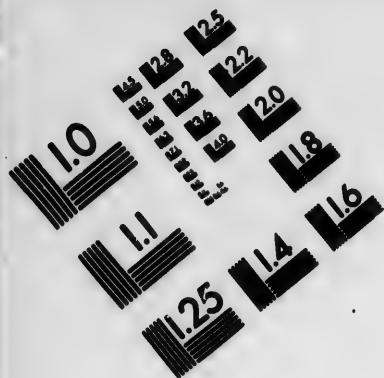
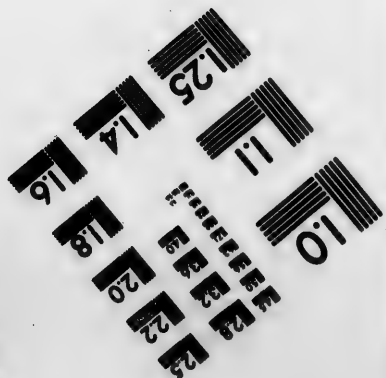
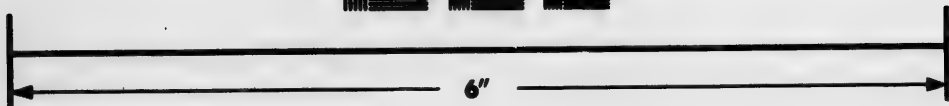
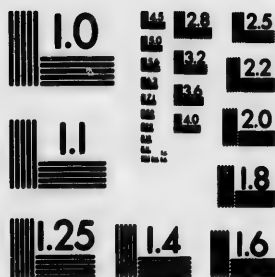


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of the statute sufficiently describes the acts constituting an offense, no more is required in framing an indictment under it than to employ the words of the statute; but when the statute does not describe the acts, the indictment must set them forth.

6. *Conspiracy—Sufficient Indictment:* An indictment under section 46 of the Criminal Code, which charges that the defendants unlawfully, etc., did conspire and agree together to then and there falsely represent and state to certain members and shareholders, the names of whom are to the said jurors unknown, of the Lumberman's Building and Loan Association, then and there, a corporation organized and existing under and by virtue of the laws of the said State of Illinois, for the purpose of getting nine or more members and shareholders of the said Building and Loan Association to join in a petition and file the same in the Circuit Court of Cook County, praying for a receiver to be appointed for the said Building and Loan Association, that the said association was then and there insolvent, with the fraudulent and malicious intent then and there wrongfully and wickedly to injure the business and property of the said Building and Loan Association, is sufficient to sustain a conviction of the offense charged.
7. *Evidence—Of Prior Offenses in Criminal Cases:* In a prosecution against two defendants for a conspiracy to injure a building and loan association, evidence of the commission of a similar offense by one of the defendants is not admissible.
8. *Same—Of Other Offenses:* The rule which excludes upon the trial for one offense, evidence of other and distinct offenses, recognizes an exception in cases where it is necessary to show such other offense for the purpose of proving knowledge or intent in the commission of the offense for which the trial is had; and when the offered offense tends to prove the charge, in the indictment, the mere fact that it may tend to prove the commission of another crime does not render it inadmissible.
9. *Same—Of Other Offense, When Not Admissible:* Where the evidence only tends to show the commission of another crime, and for that reason makes it probable that the accused may have committed the offense charged in the indictment, its admission is erroneous.
10. *Variance—Proofs must Correspond with the Allegations of the Indictment:* An allegation in an indictment for a conspiracy, describing a report as sworn to by the secretary of a building and loan association on the twelfth day of January, 1898, is not sustained by the introduction of a report sworn to on the thirteenth day of January.
11. *Criminal Law—Application of the Indeterminate Sentence Act:* The provisions of the indeterminate sentence act do not apply to the offense of conspiracy, under section 46 of the Criminal Code, providing for the punishment of persons convicted by imprisonment in the penitentiary or by fine, or both.

12. *Crimes—Felonies and Misdemeanors:* Where an offense is punishable by imprisonment in the penitentiary, or by a fine only, it is only a misdemeanor, and the provisions of the indeterminate act do not apply.
13. *Bill of Particulars—In Criminal Cases:* A person indicted under section 46 of the Criminal Code for a conspiracy is entitled upon proper application, to a bill of particulars.

Appellate Court of Illinois, First District.

Writ of error to the Criminal Court of Cook County; Hon. Edmund Burke, Judge. (*)

Edward O. Towne and John L. Mowatt, convicted of conspiracy, bring error. Reversed.

Statement.—At the June, 1898, term of the Criminal Court of Cook County, the grand jury returned an indictment against plaintiffs in error, Edward O. Towne and John L. Mowatt, which indictment consists of seven counts, and is substantially as follows:

"The first count presents that plaintiffs in error on the first day of June, in the year of our Lord one thousand eight hundred and ninety-eight, in said County of Cook, in the State of Illinois aforesaid, unlawfully, fraudulently, maliciously, wrongfully and wickedly did conspire and agree together to then and there falsely represent and state to certain members and shareholders, the names of whom are to the said jurors unknown, of the Lumberman's Building and Loan Association, then and there a corporation organized under and by virtue of the laws of the said State of Illinois, for the purpose of getting nine or more members and shareholders of the said, The Lumberman's Building and Loan Association, a corporation as aforesaid, to join in a petition and file the same in the Circuit Court of said Cook County, praying for a receiver to be appointed for said, The Lumberman's Building and Loan Association, a corporation as aforesaid, that the said, The Lumberman's Building and Loan Association, a corporation as aforesaid, was then and there insolvent, and that the annual detailed statement and report of the assets of the said, The Lumberman's Build-

(*) The official report states Hon. Frank Baker as the presiding judge in the court below, which is error. It may be that he presided at some preliminary proceeding or empaneled the grand jury; but Judge Burke presided at the trial and pronounced the sentence. The syllabus, with sub-headlines is official.

ing and Loan Association, a corporation as aforesaid, is as follows:

ASSETS.	
Loan (real estate).....	\$219,100.00
Loans (stock)	30,618.90
Real estate	70,193.68
Real estate sold (bal. due).....	17,278.77
Interest and premium (accrued and unpaid)....	8,073.27
Advanced for insurance and taxes and foreclosure and expenses.....	5,100.30
Furniture and fixtures.....	200.00
On hand December 31, 1897.....	2,429.27
	<hr/>
	\$352,994.19

"Of the condition of the said Lumberman's Building and Loan Association, a corporation as aforesaid, at the close of business on the 31st day of December in the year of our Lord one thousand eight hundred and ninety-seven, made by one Edwin E. Hooper, secretary of the said, The Lumberman's Building and Loan Association, a corporation as aforesaid, and sworn to by the said Edwin E. Hooper, secretary as aforesaid, on the 12th day of January in the year of our Lord one thousand eight hundred and ninety-eight, before one Henry M. Hardner, a notary public in and for said Cook County, Illinois, and certified to by one Harry C. Jackson, one J. W. Rhodes, whose first name is to the said jurors unknown, and one H. M. Nixon, whose first name is to the said jurors unknown, members of the said, The Lumberman's Building and Loan Association, a corporation as aforesaid, and at the time of such certification not officers of said, The Lumberman's Building and Loan Association, a corporation as aforesaid, and thereafter said certification filed by said Edwin E. Hooper, secretary as aforesaid, with the auditor of public accounts of said State of Illinois, was false and untrue, and that the said statement of assets so filed with said auditor of public accounts gave false, fictitious and exaggerated value of the assets of the said, The Lumberman's Building and Loan Association, a corporation as aforesaid, a more particular description of which are to the said jurors unknown, and that the true value of said assets so mentioned in said statement of assets so filed with

said auditor of public accounts were, at the time said statement was so filed with said auditor of public accounts, much less in amount than the value of said assets as named in said statement, with the fraudulent and malicious intent then and there wrongfully and wickedly to injure the business of the said, The Lumberman's Building Association, a corporation as aforesaid.

"And the jurors aforesaid, on their oaths aforesaid, further presents that said, The Lumberman's Building and Loan Association, a corporation as aforesaid, was not then and there insolvent, and that said statement and report of the assets of The Lumberman's Building and Loan Association, a corporation as aforesaid, as filed with the auditor of public accounts as aforesaid, were not false and untrue, and that said statement of assets so filed with said auditor of public accounts as aforesaid, did not give false, fictitious and exaggerated values of the assets of the said, The Lumberman's Building and Loan Association, a corporation as aforesaid, and that the true value of said assets were not less in amount than the value of said assets, as named in said statement, as they, the said Edward O. Towne and said John L. Mowatt, then well knew, and contrary to the statute and against the peace and dignity of the same, People of the State of Illinois."

The second and third counts do not vary in any essential matter from the first, except that the time of the offense is laid at March 1, 1898, instead of June 1st, as in the first count, and that each of the two latter counts alleges that the false statements alleged were made with intent, then and there wrongfully and wickedly, to injure the business (in one count) and the property (in the other count) of the Lumberman's Building and Loan Association.

The fourth count presents that plaintiff in error, on the first day of March, in the year of our Lord, one thousand eight hundred and ninety-eight, in said County of Cook, in the State of Illinois aforesaid, unlawfully, fraudulently, maliciously, wrongfully and wickedly did conspire and agree together to then and there falsely represent and state to certain members and shareholders, the names of whom are to said jurors unknown, of The Lumberman's Building and Loan Association, then and there a corporation, organized and existing under and by virtue of the laws of the State of Illinois, for the

purpose of getting nine or more members and shareholders of said The Lumberman's Building and Loan Association, a corporation as aforesaid, to join in a petition and file the same in the Circuit Court of said Cook County, praying for a receiver to be appointed for said The Lumberman's Building and Loan Association, a corporation as aforesaid, that the said The Lumberman's Building and Loan Association, a corporation as aforesaid, was then and there insolvent, with the fraudulent and malicious intent, then and there wrongfully and wickedly, to injure the business and property of said The Lumberman's Building and Loan Association, a corporation as aforesaid, and the jurors aforesaid on their oaths aforesaid, further present that The Lumberman's Building and Loan Association, a corporation as aforesaid, was not then and there insolvent, as they, the said Edward O. Towne and said John J. Mowatt, then well knew, contrary to the statute and against the peace and dignity of the same, People of the State of Illinois.

The fifth, sixth and seventh counts are alike in substance; each presenting the charge in the language of the statute.

The fifth presents that plaintiffs in error, on the first day of March, in the year of our Lord, one thousand eight hundred and ninety-eight, in said County of Cook, in the State of Illinois aforesaid, unlawfully, fraudulently, maliciously, wrongfully and wickedly, did conspire to injure the business and property of The Lumberman's Building and Loan Association, then and there a corporation organized and existing under and by virtue of the laws of the State of Illinois, contrary to the statute and against the peace and dignity of the same, People of the State of Illinois.

A motion was made by the plaintiffs in error to quash the indictment and each count thereof, which was overruled.

A motion was also made by the plaintiffs in error for a rule upon the State to file a bill of particulars, which motion was overruled. A motion was also made by plaintiffs in error for a rule requiring the State to elect between the counts of the indictment, and this motion was overruled.

Pleas of not guilty were entered. The cause was tried and a verdict rendered finding the plaintiffs in error guilty of conspiracy, as charged, and fixing the punishment of Towne at

imprisonment and a fine, and the punishment of Mowatt at a fine only.

The verdict as to Towne was in the form following:

"We, the jury, find the defendant, Edward O. Towne, guilty of conspiracy in manner and form charged in the indictment, and we fix the punishment of the said defendant, Edward O. Towne, at imprisonment in the penitentiary and a fine of fifteen hundred dollars (\$1,500).

"And we further find from the evidence that the defendant Edward O. Towne, is not between the ages of ten and twenty-one years, but is about the age of thirty-eight years."

At the trial evidence was proffered by the State and admitted over the objection of plaintiffs in error, tending to show that plaintiff in error, Towne, and his brother had, at a previous time, viz.: in the month of February, 1898, prepared a petition or bill of complaint seeking to obtain an investigation of the affairs of another building and loan association, the Masonic Mutual Savings and Loan Association, charging insolvency of that association, and seeking to procure the appointment of a receiver for its property, and also tending to show that the association last named had paid to plaintiff in error, Towne, the sum of \$1,000 to induce him to desist from the prosecuting of such petition or bill of complaint.

A motion for a new trial was interposed by plaintiffs in error and overruled. The sufficiency of the counts of the indictment was again raised by a motion in arrest of judgment, and this motion was overruled, and the plaintiffs in error were sentenced by the trial court upon and in accordance with the verdict.

Appropriate exceptions were preserved by the plaintiffs in error to these rulings of the trial court.

Chas. M. Haray, John J. McDannold, Ross C. Hall, A. N. Lasley, John F. Geeting and W. Knox Haynes, for the plaintiffs in error.

Charles S. Deneen, State's Attorney, Harry Olson and Frank W. Blair, Assistant State's Attorneys, R. M. Wing and N. A. Partridge, of counsel, for the defendant in error.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The first question presented upon this record is the suffi-

ciency of the various counts of the indictment. We will consider these counts in the reverse order of their numbering. The fifth, sixth and seventh counts are alike in substance, and each of them presents only that plaintiffs in error did "unlawfully, maliciously, wrongfully and wickedly conspire and agree together with the fraudulent and malicious intent, then and there wrongfully and wickedly to injure the business and property of the Lumberman's Building and Loan Association, etc., contrary to the statute," etc.

It is contended by counsel for the plaintiffs in error that these counts are insufficient in that they do not charge a conspiracy to do any act which is of itself unlawful, nor to do any lawful act by means which are unlawful. It is also contended that the charge of these counts is not set forth with a degree of certainty sufficient to inform the one accused of the nature of the accusation. On the other hand, counsel for the people contend that the charge of these counts, being in the language of the statute is therefore sufficient.

The statute in question provides as follows:

"If any two or more persons conspire or agree together, * * * with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or employment, or property of another, * * * or to do any illegal act injurious to the public trade, health, morals, police or administration of public justice * * * or to commit any felony, they shall be deemed guilty of a conspiracy," etc.

The question presented is whether these three counts of the indictment which present in the language of the statute that plaintiffs in error did conspire to injure the property and business of the Lumberman's Building and Loan Association, are sufficient without any allegation as to the nature of the injury which was the object of the conspiracy, and without any allegation as to the means by which such injury was to be effected. We are of opinion that these counts are insufficient.

The rule that it is sufficient to charge a statutory crime or offense in the language of the statute, is subject to qualification. Whether in any case it is enough that the indictment is merely framed in the words of the statute, must depend upon whether the words of the statute so far particularize the offense as by their use alone to notify the accused of the precise offense charged upon him. *West v. People*, 137 Ill. 187; *Hunter*

v. People, 52 Ill. App. 367; *Williams v. People*, 67 Ill. App. 344; Bishop's Stat. Crimes (2d ed. —, Sec. 447b, and 449); *State v. Costello*, 62 Conn. 128; *Brown v. State*, 76 Ind. 85; *State v. Howard*, 34 L. R. A. 178; *U. S. v. Cruikshank*, 92 U. S. 542.

The statute here is broad enough to cover a multitude of different forms of injury, to any one of which might be the object of the agreement which is made an offense. As said in the *Hunter Case*, *supra*, it would have been quite impracticable to set out in statute all the various ways by which an injury to business or property might be effected, or the various forms of injury thus brought within the scope of the act. Therefore the offense is stated in general terms. It covers in the general provision any special injury to the business, etc., of another, which the offenders unlawfully conspire to do. But this general provision does not obviate the necessity of presenting in the indictment the special injury which was the object of the conspiracy charged. Suppose that the allegation had been that plaintiffs in error had conspired together with the malicious intent, etc., to commit a felony, without specifying the felony; how could the accused, if innocent of the charge, learn from the language of the indictment or statute the nature of the offense which it was sought to prove against him? What felony? And in the indictment here, what injury?

In the *West Case*, *supra*, the court said:

"Under every sort of Constitution known among us, an indictment which does not substantially set down, at least in general terms, all the elements of the offense, everything which the law has made essential to the punishment it imposes, is void. And besides this, under most of our constitutions, the allegation must descend far enough into particulars and be sufficiently certain in its form of words to give the defendant reasonable notice of what is meant."

Wharton gives the rule applying to such statutory offenses as follows:

"On the general principles of common law pleading it may be said that it is sufficient to frame the indictment in the words of the statute in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense he is tried

for really is. It is no more allowable under a statutory charge to put the defendant on trial without specification of the offense, than it would be under a common law charge." Wharton's Crim. Pl. & Pr. (8th ed.), Sec. 220.

Bishop announces the same rule in substance. 1 Bishop New Cr. Pr. (4th ed.), Sec. 81 *et seq.*, and 623 *et seq.*

Nor does the effect of section 408 of the Criminal Code operate against this rule. That section provides as follows:

"Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense, or so plainly that the nature of the offense may be easily understood by the jury." etc.

This provision has been construed by our Supreme Court as relating to matters of form and not to the substantial requirements of an indictment. *McNair v. People*, 89 Ill. 441; *Johnson v. People*, 113 Ill. 99; *Prichard v. People*, 149 Ill. 50; *Cochran v. People*, 175 Ill. 28; *Williams v. People*, 67 Ill. App. 344; *Rank v. People*, 80 Ill App. 40.

In *Johnson v. People*, *supra*, the court said: It sometimes happens, however, that the language of a statute creating a new offense does not describe the act or acts constituting such offense. In that case pleader is bound to set them forth specifically. *Kibs v. People*, 81 Ill. 599; and 1 Wharton on Crim. Law, Secs. 164, 372.

In *Cochran v. People*, *supra*, the indictment charged that Cochran did unlawfully, etc., administer and use on one Stella Roberts, then and there being a woman pregnant with child, a certain instrument, the name of which is to the grand jurors unknown, with the intent then and there to produce an abortion, etc., the said Cochran then and there well knowing that the said instrument would produce such miscarriage, etc., and by reason of such miscarriage, the said Roberts then and there died, etc. The court held that the indictment was insufficient to sustain a conviction, saying:

"Both counts attempt to charge that the offense was committed with an instrument. * * * No attempt whatever is made in either count to state how or in what manner the instrument was used, etc. * * * The only attempt to justify this departure from well understood rules of criminal pleading, is the contention that being a statutory offense, the indict-

ment is sufficient as charging it in the terms and language of the statute, or so plainly that the nature of the offense might be easily understood by the jury, relying upon section 6 of division 11 of the Criminal Code. * * * It is not intended to announce any rule which will render nugatory the provision of section 6 of division 11 of the Criminal Code, wisely intended to simplify criminal pleadings and dispense with many technical and useless averments heretofore required in indictments; but we are not prepared to hold that a defendant indicted under a statute of this kind for a most serious offense is not fairly entitled to notice by statements in the indictment, as to the act or acts with which he is charged in the commission of the offense."

Section 6 of division 11, above referred to, is the same provision of the act otherwise described as section 408 of the Criminal Code.

And in *Williams v. People, supra*, this court, speaking through Mr. Presiding Justice Boggs, said:

"If the language of the statute sufficiently describes the act or acts constituting the offense, then no more is required than that the words of the statute be employed in the information or indictment; but when, as in the case at bar, the statute does not describe such acts, then the indictment must set them forth."

We are of opinion that the fifth, sixth and seventh counts of this indictment are, and each is wholly insufficient to sustain the conviction.

The first three counts of the indictment are out of consideration, because in each of these counts it is charged in effect that plaintiffs in error conspired to represent to members of the Association, for the purpose of inducing nine or more of them to join in a petition for a receiver, that the association was insolvent; that the annual statement and report of the assets of the association (setting the report out), showing conditions on December 31, 1897, made by one Hooper, secretary of the association, and sworn to by him on January 12, 1898, etc., and filed with auditor, etc., of State of Illinois, was false and untrue; and charging further that the association was not then insolvent, and that the said report was not false and untrue, etc., which averments are not sustained by the evidence.

Without going into a needless discussion of the sufficiency of

these three counts in substance or certainty of averment, it is enough to say that the evidence does not establish, or even tend to establish, the charge that plaintiffs in error conspired to make representations that the report as set forth in the indictment was false. The indictment undertook to describe the report of December 31, 1897, and did describe it as sworn to by Hooper, secretary of the association, on January 12, 1898. No such report appears even to have been sworn to by the secretary upon that date. The report offered in evidence, as the report set forth in these counts of the indictment, was sworn to by Hooper, secretary, upon the 13th of January, 1898. The report set forth in these counts is further described as a report filed with the auditor of public accounts of the State of Illinois. The report offered in evidence was not filed in the office of the auditor until March 7, 1898, after the date of the offense as laid in some of the counts, and after the date of some of the acts by plaintiff in error, shown as proving the alleged conspiracy. John Berg testified to acts of plaintiff in error Towne, upon March 5th; Becker to acts upon March 5th or 6th. It is not established by any evidence that plaintiffs in error conspired to make representations of any nature as to "a report sworn to by the secretary of the association on the 12th day of January, 1898, and filed by him with the auditor of public accounts."

These averments are of the means by which the injury charged as the object of the conspiracy was to have been committed. They are material averments and they are not proved. Therefore, these three counts, as well as the last three, are out of consideration as supporting this conviction. *Limouze v. People*, 58 Ill. App. 314; *Bromley v. People*, 150 Ill. 297.

We come, then, to a consideration of the fourth count of the indictment. The substance of that count is set forth in the statement of facts preceding this opinion. It presents in effect that the unlawful conspiracy was to falsely represent to certain members of the association that the association was insolvent, for the purpose of getting nine or more members to join in a petition praying for the appointment of a receiver for the association, and with the fraudulent and malicious intent to thus injure the business and property of the association; and the indictment presents that the association was not then and there insolvent, as plaintiffs in error well knew, etc.

We are of opinion that this count would be sufficient to sustain the conviction, if the evidence supported it, and in absence of error in procedure.

The gist of the offense, the unlawful conspiracy to injure the business and property of the association, the nature of the injury, the filing of a petition for the appointment of a receiver, and the means by which the injury was to be effected, the representing falsely to members that the association was insolvent, are all so plainly set forth by this count that the provisions of section 408 of the Criminal Code apply, if they ever apply to aid any indictment. The indictment by this count states the offense in the language of the statute so plainly that the nature of the offense may be easily understood by the jury, and with sufficient of particularity to put the accused upon fair and full notice of the precise nature of the charge he was to meet.

We have, then, to inquire as to the evidence and the rulings of the trial court upon matters of procedure.

Without discussing the evidence at length, it is sufficient, in view of the disposition that must be made of this cause, to say that we are not prepared to hold that the evidence is insufficient to sustain a conviction under the fourth count of the indictment, if there was no serious error in procedure.

Among the errors complained of is the admitting, over objection, of evidence of a former unlawful attempt to procure the appointment of a receiver for the property of another and different association. Testimony was admitted over the objection of plaintiffs in error, tending to show that in February, 1898, preceeding the alleged offense, plaintiff in error Towne had prepared a petition seeking the appointment of a receiver for the property of another similar association, viz.: The Masonic Mutual Savings and Loan Association, upon the ground set up in the petition that it was insolvent; and that in consideration of the payment of a sum of money by officers of that association, Towne had desisted from filing the petition. Plaintiff in error Mowatt, was in no way connected with the transaction. It is contended by counsel for the State that this evidence was competent to show intent. We are of opinion that the evidence was incompetent for any purpose, and that it was error to admit it. It is true that the rule which excludes, upon trial for one offense, evidence of other and distinct of-

fenses, recognizes an exception in cases where it is necessary to show such other and distinct offenses for the purpose of proving knowledge or intent in the committing of the offense for which trial is had. Thus, it is frequently permitted in practice, and sanctioned, to show upon indictment for uttering forgeries and counterfeits that like acts have been committed by the accused, and for the purpose of establishing the guilty knowledge and intent in the instance under investigation. So, too, this exception to the general rule has been extended, though less frequently, to other cases, such as arson, robbery and conspiracy. But the general rule is salutary, and departure from it is perilous, and hence courts are reluctant to extend the exception to the rule beyond well-established lines. While the decisions of different jurisdictions vary somewhat as to the application of this exception to this rule, yet they are all in substantial accord upon the proposition that unless there be some apparent logical connection between the two offenses, either by reason of both being *res gestae*, or both being part of one system, or the one tending to show a *scienter* in the other, the general rule governs, and the exception to it does not apply. *Commonwealth v. Jackson*, 132 Mass. 16; *Swan v. Commonwealth*, 104 Pa. St. 218; *People v. Sharp*, 107 N. Y. 427; *Snapp v. Commonwealth*, 82 Ky. 173.

Our Supreme Court has taken very decided ground upon the question. *Kribs v. People*, 82 Ill. 425; *Baker v. People*, 105 Ill. 452; *McDonald v. People*, 126 Ill. 150; *Farris v. People*, 129 Ill. 521; *Parkinson v. People*, 135 Ill. 401.

And this court, in *Jackson v. People*, 18 Ill. App. 508, adhered to the safe application of the general rule.

The safety of the general rule and the danger of departure from it is well illustrated in this case. The transaction with the Masonic association had no connection whatever with the matter here in question. Plaintiffs in error are here charged with a conspiracy, and in the former transaction one of them only were concerned. The indictment gave them no notice whatever that the former transaction was to be investigated upon this trial. And yet a very large amount of evidence was admitted to establish the participation of plaintiff in error Towne, in that matter. It was not part of *res gestae* of the subject-matter of this trial. No system is shown of which it was a part. Nor are we prepared to hold that the participa-

tion of Towne in the former transaction tends to show a *scienter* on the part of Towne and Mowatt in entering into the unlawful agreement, which is the gist of the offense here charged.

The Illinois cases relied upon by counsel for the State are: *Dunn v. People*, 40 Ill. 465; *Thomas v. People*, 59 Ill. 160; *Ochs v. People*, 124 Ill. 399; *Williams v. People*, 166 Ill. 132; *Crane v. People*, 168 Ill. 395; *Schintz v. People*, 178 Ill. 320; *Orr v. People*, 63 Ill. App. 305.

In the *Dunn* case the evidence in question was of a matter clearly connected with the transaction there involved. In the *Thomas* case the evidence was held competent not only to show guilty knowledge, but, as well, a part of the scheme or system, and it was clearly connected with the acts constituting the offense there charged. We are unable to find anything in the decision of the *Ochs* case which applies here. In the *Williams* case the evidence in question was admitted as showing other offenses which were part of one general scheme or system with the offense charged. And the court, in passing upon its admissibility, said:

"It seems to be well settled that when the offered evidence tends to prove the charge in the indictment, the mere fact that it may tend to prove another crime does not make it inadmissible. If, however, the offered evidence only tends to prove that the accused committed another crime, and for that reason it is probable that he may have committed the crime alleged in the indictment, the admission of such evidence would be erroneous. * * * While there may be some doubt in regard to the ruling of the court on the admission of the evidence complained of, and while we might be better satisfied with the verdict of the jury had the court excluded the evidence, yet the guilt of the plaintiff in error was so clearly established that we do not regard the ruling of the court on the admission of evidence as sufficient ground to cause a reversal of the judgment."

In the *Crane* case the disputed evidence was of matters directly connected with the offense there charged, and the decision in that case has no bearing upon the question here presented. In the *Schintz* case the court said of the evidence there in question:

"The evidence would have been improper but for the fact

that the Keck note and mortgage belonged to the Ertel estate. The offense charged was with reference to the property belonging to the estate of Francis Ertel. Any fact necessary to introduce or explain another which is in issue may be proven."

In the *Orr* case, this court said:

"It may be regarded as settled that any evidence that tends to prove the issue is competent, notwithstanding that it may be injurious to the defendant, and may tend to prove distinct offenses against him."

In the case here under consideration, the proof of the distinct offense did not tend to prove the issue, viz.: an alleged conspiracy by plaintiffs in error. We find nothing in any of the Illinois decisions cited by counsel and above considered which supports the contention that this evidence was competent. That it was prejudicial to plaintiffs in error is a probability too strong to be disregarded. We are, therefore, disposed to view the admission of the evidence as to the transaction between plaintiff in error Towne and the Masonic association as reversible error.

Another question of controlling importance, which is raised upon this record, is as to the punishment fixed by the verdict and judgment. The verdict fixed the punishment of plaintiff in error Towne "at imprisonment in the penitentiary" and a fine. He was sentenced under the provisions of the indeterminate sentence, to imprisonment in the penitentiary without fixing any definite period of imprisonment. It is contended by counsel for plaintiff in error Towne that in this there was error, and that the provisions of the indeterminate sentence act do not apply to the offense of which this plaintiff in error was found guilty. We are of opinion that the contention is sound. There is no decision, so far as we are aware, in which the precise point here involved has been considered and settled. But by analogy, the decision in *Lamkin v. People*, 94 Ill. 501, would seem to govern. In that case the controlling question was as to whether the offense was a felony or a misdemeanor. The offense charged there, as here, was conspiracy, and it was held that because the punishment of the offense was either by imprisonment in the penitentiary or by a fine, it was not within the terms of our statute defining a felony as an offense punishable with death or by imprisonment in the penitentiary. Applying to the question presented the same reasoning fol-

lowed in the *Lamkin* case, we are led to the conclusion that the offense here being a misdemeanor, does not fall within the provision of section 498 of the Criminal Code. The language of the act is "that every person * * * convicted of a felony or other crime punishable by imprisonment in the penitentiary," etc. This would include a misdemeanor as well as a felony, provided the misdemeanor was one punishable by imprisonment in the penitentiary within the meaning of the act. But the *Lamkin* case decides that an offense punishable by either imprisonment in the penitentiary or by fine, is not an offense within the meaning of such language. We cannot, without disregarding the decision in that case, hold that the provisions of the indeterminate sentence act include a misdemeanor punishable by either imprisonment in the penitentiary or by a fine alone. The construction adopted in the *Lamkin* case has been adhered to in *Bails v. People*, 123 Ill. 428, and in *Herman v. People*, 131 Ill. 594.

Question is also raised to the ruling of the trial court in the matter of the application of plaintiffs in error, for a bill of particulars. In view of the disposition which must be made of this cause, it is not necessary to go into a consideration of the procedure of the trial court in relation to this motion. It is enough to say that under the rule of procedure in this State, plaintiffs in error would be entitled to such a bill of particulars upon motion. *McDonald v. People*, 126 Ill. 150.

Whether the court refused the rule moved for, whether the inspection of the books of the association was accepted in lieu of a bill of particulars, and whether the averments of the first three counts were agreed upon to be a bill of particulars, are all matters of no further importance in this case. For the same reason, we deem it unnecessary to discuss the motion for an election by the State between the counts of the indictment.

No other questions of procedure are presented which we regard it necessary to consider.

For the error in admitting the evidence above indicated and because the punishment fixed by the judgment is unwarranted under the statute, the judgment is reversed and the cause is remanded.

NOTE (By J. F. G.): Upon the announcement of the above opinion a petition for rehearing was presented, bearing in particular on the last

proposition passed upon in the opinion; but it was overruled. As the State's Attorney had no right of appeal, a grave situation was presented to him. Several persons were then serving sentences in the penitentiary who might regain their liberty by reason of the doctrine announced in the *Towne Case*. One of these persons, Cory Miller, convicted of conspiracy, sued out a writ of *habeas corpus* before Judge Holdom of the Superior Court of Cook County. While that case was pending the relator was induced to file another petition before the Supreme Court, under a promise that he should have his liberty regardless of the decision of that court. We do not have the relator's brief before us and do not know whether the matter was fully presented or not; but the opinion of the court was adverse to the petition, destroying the force of the *Towne Case* as to that point in Illinois. Whether the decision is consistent with the *Lampkin Case*, cited above or not may be a matter of dispute; but both cases are now accepted as authorities. In the *Lampkin Case* the court in defining what a felony is, said:

"It will be noted, 'a felony is an offense punishable'—that is, absolutely punishable, not that *may or may not be* 'punishable with death or by imprisonment in the penitentiary,' while the offense of which plaintiffs in error are indicted and convicted here shall be punishable by imprisonment in the penitentiary or *by fine*. Surely it is no more accurate, in view of this language to say this offense is punishable by imprisonment in the penitentiary, than to say it is punishable by fine, and it is impossible to say, under any rule of construction, that we are bound to lay any more stress on the language fixing the punishment by confinement in the penitentiary than that on fixing the punishment by fine."

It will be noted that the language in the two statutes is different; but that did not seem to enter into the consideration of the *Miller Case*, which we incorporate into these notes as follows:—

PEOPLE EX REL. CORY MILLER V. EDWARD J. MURPHY.

185 Ill. 623—57 N. E. Rep. 820.

Opinion filed June 21, 1900.

Original petition for writ of *habeas corpus*.

Frederick S. Baker, for the relator.

E. C. Akin, Attorney General, *Charles S. Deneen*, State's Attorney, and *Ferdinand L. Barnett*, for the respondent.

Mr. CHIEF JUSTICE BOGGS delivered the opinion of the court:

This is a petition praying that a writ of *habeas corpus* issue out of this court commanding Edward J. Murphy, warden of the Illinois State penitentiary at Joliet, to produce one Cory Miller (an inmate of said penitentiary) before this court. It appears from the allegations of the petition the said Cory Miller was on the third day of February, 1898, placed on trial in the Criminal Court of Cook County under an

indictment returned by the grand jury of said Cook County, charging that said Miller and another did feloniously, unlawfully and wickedly conspire, combine, confederate and agree together, in the peace of the people, etc., unlawfully, willfully, feloniously and of their malice aforethought to make an assault upon and kill and murder one Charles G. Meyer, etc.; that the jury to whom said cause was submitted returned the following verdict: "We, the jury, find the defendant, Cory Miller, guilty of conspiracy in manner and form charged in the indictment, and we fix the punishment of the said defendant, Cory Miller, at imprisonment in the penitentiary; and we further find, from the evidence, that the said defendant, Cory Miller, is not between the age of ten (10) and twenty-one (21) years, and that he is about the age of forty years;" that a motion entered on behalf of said Miller for a new trial and in arrest of the judgment were each overruled and sentence was pronounced by the court on the verdict, and that the judgment of conviction entered in said cause in said court is as follows: "Therefore, it is ordered and adjudged by the court that the said defendant, Cory Miller, *alias*, be and he hereby is sentenced to the penitentiary of this State at Joliet for the crime of conspiracy, whereof he stands convicted; and it is further ordered and adjudged that the said defendant, Cory Miller, be taken from the bar of the court to the common jail of Cook County, and from thence by the sheriff of Cook County to the penitentiary of this State at Joliet, and be delivered to the warden or keeper of said penitentiary; and the said warden or keeper is hereby required and commanded to take the body of the said defendant, Cory Miller, and confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof until discharged by the State Board of Pardons, as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced." The petition further alleged that said Miller, under this judgment of conviction, was committed to the penitentiary at Joliet, and that he is now detained in such penitentiary by the said warden thereof.

The indictment constituted a charge of conspiracy under the provisions of section 46 of the Criminal Code (Hurd's Stat. 1897, p. 553), which section provides that any one convicted of offending against its provisions shall be "imprisoned in the penitentiary not exceeding five years, or fined not exceeding \$2,000, or both." It was under this section the said Miller was tried and convicted, and sentenced to be imprisoned in the penitentiary for an undetermined period.

Waiving, for the purposes of deciding the prayer of this petition, the question whether the said Miller should resort to a writ of error to bring the judgment of conviction before a court of review, we proceed to consider the contention of the petitioner that the verdict and judgment are void and his detention thereunder is unauthorized by law. Two grounds are presented in support of the contention:

First—That the act entitled "An act in relation to the sentence of persons convicted of crime and providing for a system of parol," af-

firmed June 15, 1895, has application only to persons convicted of such crime as are punishable (to quote the language of counsel for the petitioner) "absolutely by imprisonment in the penitentiary," and has no application to this petitioner, who was convicted of an offense which is punishable either by imprisonment in the penitentiary or by a fine, or by both.

Second—That this court in *George v. People*, 167 Ill. 447, the board of penitentiary commissioners, who, as petitioner insists, were possessed substantially of the powers now possessed by the State Board of Pardons, were without power to "discharge a prisoner" from the penitentiary, and therefore that the judgment of conviction was void for the reason it adjudged the petitioner should be confined in the penitentiary at Joliet "until discharged by the State Board of Pardons, as authorized and directed by law."

Neither of these positions is sound. Section 1 of the act in question (Hurd's Stat. 1897, Crim. Code, par. 498), provides: "That every person over twenty-one years of age, who shall be convicted of a felony or other crime punishable by imprisonment in the penitentiary, excepting treason and murder, shall be sentenced to the penitentiary, but the court imposing such sentence shall not fix the limit or duration of the sentence." The word "punishable" means not must be so punished, but liable to be so punished or may be so punished. Such is the meaning given the word by legal lexicographers, (Anderson's Law Dic. p. 846; Bouvier's Law Dic. "Punishable;") and the word was defined to mean "liable to punishment" in *Commonwealth v. Pemberton*, 118 Mass. 36, and to mean "may be punished" in *State v. Watkins*, 7 Sandf. 94, and to mean not "must" but "may" be so punished in *State v. Nuemer*, 49 Conn. 233, and *Miller v. State*, 58 Ga. 200. In 19 Am. & Eng. Ency. of Law, p. 568, in defining the word "punishable" it is said: "If an offense may be punished by a certain penalty it is punishable by such penalty, although the discretion of the court or under different circumstances other penalties may be imposed. Its meaning is not restricted to an offense as must be so punished." In *In re Mills*, 135 U. S. 263, the words "punishable by imprisonment at hard labor," employed in the act of Congress approved March 1, 1889, defining the criminal jurisdiction of a United States court in the Indian Territory, were interpreted to embrace offenses which, although not imperatively required by statute to be so punished, might be punished in that manner.

The purpose of the enactment establishing the system of indeterminate sentences and paroles is the amelioration of the conditions of persons confined in the penitentiaries of the State, and its beneficial operation should not be restricted by mere construction. The phrase "crime punishable by imprisonment in the penitentiary," etc., employed in the first section of the act, we construe to embrace every crime (except treason and murder) which, though not a felony, may be punished by imprisonment in the penitentiary, and not to mean only such offenses as must absolutely be so punished. It is true, as held by this court in *Lamkin v. People*, 94 Ill. 501, and other cases,

the crime of which the petitioner, Miller, was convicted is a misdemeanor, but the question whether the act establishing the "parol system" or system of indeterminate sentences applies to him as a convict in the penitentiary does not depend upon the mere classification of the offense as a misdemeanor. The statute affixes punishment by imprisonment in the penitentiary as one mode of punishment which may be inflicted for the perpetration of the crime of which the petitioner is convicted. The crime is, therefore, one which is "liable to" or "may be" punished by such imprisonment—that is, is a crime punishable in that manner. Though but a misdemeanor, it was lawful for the jury to determine that the petitioner should be punished by imprisonment in the penitentiary. That the jury might have determined the imposition of a fine would answer the demands of justice has no effect to remove the petitioner from the class of convicts who are entitled to the beneficial operation of the parol system. That the offense is classified as a misdemeanor is not the test of the application of the statute relating to indeterminate sentences, but whether the crime is punishable by imprisonment in the penitentiary. If the crime may be punished by that character of imprisonment and the perpetrator of the offense is condemned to suffer that mode of punishment, the act in question applies to the case and determines the course to be pursued by the jury and by the court in fixing his punishment, though the crime be but a misdemeanor.

The second ground advanced to justify the award of the writ is not tenable. It is not necessary to the validity of the judgment of conviction the mode and manner of the application of the provisions of the act with reference to the parol or discharge of the defendant shall be set forth in the judgment. All that is contained in the judgment with reference to the discharge of the petitioner from the penitentiary is surplusage, and neither adds to nor detracts from the right of the petitioner, as a convict, to the full operation of the statute in his behalf.

The petition does not disclose a case entitling the petitioner to a writ of *habeas corpus*.

Writ denied.

GUNNING V. PEOPLE.

189 Ill. 165—82 Am. St. 433—59 N. E. Rep. 494.

Opinion held February 20, 1901.

INDICTMENT—JUDICIAL NOTICE: *What is essential in indictment against assessor for offer to receive bribe—When court cannot take judicial notice that a lot is in a certain town—All necessary facts should be pleaded with reasonable certainty.*

1. It is essential to the validity of an indictment against a town assessor for offering to receive a bribe to reduce the assessment on certain real estate, that it appear from the indictment that the real estate is situated in the town for which the accused was acting as assessor.
2. Courts cannot take judicial notice that real estate described as "lot 1 of the assessor's re-subdivision of sub-lots 1 to 5, in block 58, of the original town of Chicago, together with the building thereon, commonly known as the Reliance Building," is situated in the town of South Chicago.
3. It is not permissible, in pleading, to leave a fact necessary to be alleged to be derived by inference from an allegation of a mere conclusion of law. Nor has this rule been changed by section 408 of the Criminal Code.

MAGRUDER, J., Dissenting.

Gunning v. People, 86 Ill. App. 676, reversed.

Supreme Court of Illinois.

Writ of error to the Branch Appellate Court for the First District; heard in that court on a writ of error to the Criminal Court of Cook county; the Hon. Richard S. Tuthill, Judge, presiding. (*).

Edward H. Morris, for the plaintiff in error.*E. C. Akin*, Attorney General, (*Charles S. Dencen*, State's Attorney, and *W. M. McEwen*, of counsel), for the People.

MR. JUSTICE CARTER delivered the opinion of the court:

Richard Gunning, the plaintiff in error, was indicted and convicted of corruptly proposing to receive a bribe to influence his official action as assessor of the town of South Chicago by reducing the assessment which had been made for purposes of

*In the 189 Ill. Hon. Arthur H. Chetlain appears as presiding judge, which is error.

taxation on a certain lot in Chicago, and was adjudged to pay a fine of \$3,500, under sections 31 and 32 of the Criminal Code. The Appellate Court having affirmed the judgment, Gunning sued out this writ of error to bring the record before this court for review.

The indictment consisted of thirty counts, all charging the same offense, varying in manner of stating particular facts, but none of them alleged that the real estate upon which the assessment was sought to be reduced was situated in the town of South Chicago, of which town Gunning was assessor. The court overruled the motion of the defendant below to quash the indictment, and although it was proved on the trial that the lot in question was in the town of South Chicago, such proof would not, of course, cure such a defect in the indictment, if defect it was, for proofs without allegations are as ineffectual as allegations without proofs.

The evidence upon the issue of guilt or innocence was conflicting and irreconcilable, but the most serious question presented to us is upon the assignment of error that the court erred in refusing to quash the indictment. A case involving such an offense is of grave importance to the public and demands careful consideration, and such a consideration we have endeavored to give it.

The charge in each of the counts was, in substance, that said Richard C. Gunning was the duly elected and qualified assessor of said town of South Chicago, and while acting as such officer, on, to-wit, etc., unlawfully and corruptly did propose to receive a bribe to influence his official action as such assessor, in this: that he, said Gunning, then and there proposed to one Charles Fellows that upon the payment then and there by him, said Fellows, to him, said Gunning, of the sum of \$1,000, he, the said Gunning, would reduce the assessed valuation, to-wit, \$100,000, for the taxes of the year 1897, upon the following described real estate, to-wit, lot 1 of the assessor's re-subdivision of sub-lots 1 to 5, in block 58, of the original town of Chicago, together with the building thereon, commonly known as the "Reliance Building," and the improvements thereon, all in said County of Cook, in the State of Illinois, to the assessed valuation, to-wit, \$91,970, which had been made on said property for the taxes of the year 1896.

It needs hardly to be stated that Gunning had, as assessor

of the town of South Chicago, no power or official authority to reduce the assessment on real estate situated outside of said town. Unless, therefore, the lot in question was situated in said town he was wholly without official authority to make the reduction he is charged with having offered to make for the alleged bribe. It follows, of course, that it must appear from the indictment before it can be sustained, that said lot was situated in said town, for to the assessment of property therein Gunning's official duty was confined. Thus, in *Van Dusen v. People*, 78 Ill. 645, it was held that an assessor, not being authorized to assess property outside of his township, cannot lawfully administer outside of such township an oath to a person concerning his rights and credits liable to assessment, and a conviction of perjury was reversed because the evidence failed to show that the affidavit was sworn to in the township before the assessor where he had the power to administer the oath. We need not, however, dwell on this branch of the question, for there is no controversy, and could be none, between counsel respecting it.

But it is contended, for the People, that from what is alleged the court will take judicial notice that the said property is situated in the town of South Chicago. If this contention be correct, then no further allegation on that subject was necessary, for matters of which the court must take notice need be neither alleged nor proved. The question is, can the courts of the jurisdiction take judicial notice that the property, as above described, is situated in the town of South Chicago? A mere statement of the question would seem to imply a negative answer, if established rules of law governing the subject are to be regarded. But counsel say, and the court will take notice, that the original town of Chicago was incorporated by an act of the legislature in 1835, and that it included "all that district of country in sections 9 and 16, north and south fractional section 10 and fractional section 15, in township 39, north, range 14, each of the third principal meridian," (Laws of 1835, p. 204,) and that the town of South Chicago now includes in its limits a part of the original town of Chicago. But even if the courts could notice which of the sections of land, or parts thereof, were included in these several towns, how could the court say, from its judicial knowledge, which of them includes the subdivision which contains the lot in

question? From the description given, the lot may as well be supposed, by all except those having special information on the subject, to be in the west or the north town as in the south town. Courts will take judicial cognizance, without allegation or proof, of the political division of the State into counties, towns, and cities; that a county is under township organization and that a particular township is in a certain county, and of the relative location of such towns with respect to each other. (See 1 Greenleaf on Evidence, sec. 6) And the author also says: "In fine, a court will generally take notice of whatever ought to be generally known within the limits of its jurisdiction." (See, also, 1 Phillips on Evidence, p. 625; 12 Am. & Eng. Ency. of Law, 151; an exhaustive note to *Lanfear v. Mester*, 89 Am. Dec. 679; *Dickenson v. Breeden*, 30 Ill. 279; *People v. Suppiger*, 103 id. 434; *Wilcox v. Jackson*, 109 id. 261.) They will also take notice of the boundaries of towns when they have been fixed by law, and counsel for plaintiff in error in this case concedes that the court could take judicial cognizance of the boundaries of the several towns in Cook County, but insists, and it seems to us correctly, that knowing such boundaries would not fix the location of the lot in question with reference to such boundaries. In *Breed v. Page*, 59 Cal. 52, it was held by a divided court that the courts of that jurisdiction would take notice of the streets of San Francisco and their relation to each other and the direction in which they run. But that decision was based on a statute of that State. This court has held that it could not judicially know that certain streets mentioned in the record were in the City of Chicago. (*Dougherty v. People*, 118 Ill. 160; *Moore v. People*, 150 id. 405.) And in *Cicotte v. Aucaux*, 53 Mich. 227, it was held that the Supreme Court of that State had no judicial knowledge of the contents of plats of Detroit or of Detroit lands, except as affected by legislation or other public action. We know of no law of this State identifying or fixing the location of block 58, or its subdivisions, in the original town of Chicago, by which we or the court below could determine its *situs* as respects the boundaries of the three towns by which the said original town is divided. Nor would it be a safe precedent to establish, to declare that its location with reference to the boundaries of the south town, or the building commonly called the "Reliance Building," had

become so universally or generally known as to have become a matter of public knowledge, to be accepted without proof in all cases where it might be collaterally involved. In *Brown v. Piper*, 91 U. S. 42, it was said: "This power is to be exercised with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

But it is urged that the question has been in effect decided by this court, and the Appellate Court seems to have so concluded. In *Gardner v. Eberhart*, 82 Ill. 316, where a debtor occupied four contiguous town lots all in one enclosure, numbered 12, 13, 14 and 15, a tenant occupying a house on 12 and a shop being on 14, the question arose whether the debtor was entitled to all the lots in the one enclosure as his homestead exemption. In deciding the case the court used this language (p. 321): "The court will take notice of the subdivision of town and city property into blocks and lots, as well as the legal subdivision by government surveys of land in the country, and when several forty-acre tracts lie contiguous, or where several village or city lots lie contiguous, and where a debtor has a dwelling on any given forty-acre tract which, with the buildings thereon, is of the value of more than \$1,000, or where a debtor has a dwelling on any given town or city lot which, with the buildings thereon, clearly exceeds in value \$1000—in such case the law regards the forty acres, or village or city lot on which the debtor's residence is situated, as the 'lot of ground by him occupied as a residence.'" Similar language was used in *Sever v. Lyons*, 170 Ill. 395, in deciding a question of homestead; but, obviously, the court did not decide or intend to decide that the court would take judicial notice of plats of subdivisions of urban lands, or of the subdivisions themselves, with reference to questions of the location of the different lots and blocks, but only that such lands were, as a rule, subdivided into blocks and lots, thus enabling the court, by making use of a matter of common knowledge, to know and apply the proper meaning intended by the legislature by the clause, "lot of ground occupied by him as a residence," in the Homestead Act.

But it is unnecessary to pursue this subject further. While it is doubtless true that matters of which courts will take judicial notice have broadened in their scope as public information

has increased, we know of no rule or precedent, and have been referred to no authority, which would sustain a decision that a court would take judicial notice of the precise location of a mere city lot in a subdivision or re-subdivision of urban lands, with respect to township or other political divisional lines, without the aid of a public statute.

The point is also made, that from the allegation that Gunning offered to receive the alleged bribe to influence his official action as assessor in reducing the assessment on the said lot it is properly deducible that, as his official action was confined to the assessment of property in the town of South Chicago, the lot must have been situated in that town. It is not permissible, in pleading, to leave a fact necessary to be averred to be derived by inference from an allegation of a mere conclusion of law. All necessary facts should be pleaded with reasonable certainty, and Section 6 of Division 11 (*) of the Criminal Code has not dispensed with that rule. (*Prichard v. People*, 149 Ill. 50; *McNair v. People*, 89 *id.* 441; 1 Bishop on Crim. Proc. sec. 627; *Thompson v. People*, 96 Ill. 158). In *People v. Davis*, 112 Ill. 272 (an action of debt to recover delinquent taxes), it was held, on demurrer, that a declaration was insufficient in law which failed to state the facts from which the liability, as a conclusion of law, resulted; that the averment that the property was taxable at the place in which it was assessed was the statement of a conclusion of law, and was bad on demurrer. But in the case at bar there is not even an allegation as specific as that. It is not even averred that Gunning, as assessor, had the power or authority to assess the property in question or to reduce the assessment upon it. It is plain the indictment should have been quashed.

The judgments of the Appellate Court and the Criminal Court are reversed, and the cause is remanded to the Criminal Court of Cook County for further proceedings not inconsistent with this option.

Reversed and remanded.

MR. JUSTICE MAGRUDER, dissenting.

*Sometimes cited as section 408 of the Criminal Code. See *Towne v. People*, *supra* 445.—J. F. G.

STATE V. BISBEE.

75 Vt. 293—54 Atl. Rep. 1081.

Decided May 16, 1903.

INDICTMENT—ADULTERY: *Insufficient indictment under Vermont Statutes—Defect not cured by verdict.*

Under one section of the Vermont Statutes it is adultery for a man to have sexual intercourse with a married woman other than his wife, while under another section it is adultery for a married man to have sexual intercourse with an unmarried woman. *Held*, that an indictment which does not allege whether the woman is married or not is fatally insufficient, and is not cured by a verdict.

Supreme Court of Vermont.

Exceptions from Addison County Court; Haselton, Judge.

Don A. Bisbee convicted of adultery, brings exceptions. Reversed.

Argued before TYLER, MUNSEN, START, WATSON, and STAFFORD, JJ.

F. L. Fish and *W. H. Bliss*, for the plaintiff.

James B. Donoway, State's Attorney, for the State.

WATSON, J. The respondent was tried and convicted of the crime of adultery. After verdict and before judgment, he moved in arrest of judgment, for that, among other things, the indictment contains no allegations showing whether the *particeps criminis* was or was not an unmarried woman. Upon exception to the overruling of this motion, the case is here.

To be guilty of the crime of adultery under the provisions of V. S. 5057, a man must have sexual connection with a married woman other than his wife; and, to constitute the crime under V. S. 5056, a married man must have sexual connection with an unmarried woman. The indictment is without any allegation that the *particeps criminis* was a married woman, hence it is insufficient under the former section; nor is it sufficient under the latter section, for it does not allege that she is an unmarried woman. This has been so held on demurrer to an indictment where the statutory provisions in these respects were the

same as those contained in the sections above named. *State v. Searle*, 56 Vt. 516. The indictment omits to allege an essential and material fact to constitute a crime under either section of the statute, and it is not implied in nor inferable from the finding of the facts alleged, whether the alleged *particeps criminis* was a married or an unmarried woman. Hence it cannot be said that the jury must have found that she was either, rather than the other; therefore the defect is not cured by the verdict. *Baker v. Sherman*, 73 Vt. 26, 50 Atl. 633.

Judgment reversed, judgment arrested, all the proceedings are set aside, and judgment that the respondent be acquitted.

DUNCAN v. STATE.

Texas, Court of Criminal Appeals—70 S. W. Rep. 543.

Decided November 19, 1902.

INDICTMENT: *Probable oversight; but fatal inaccuracy.*

In an indictment for fraudulent conversion of hired property, the charging of the hiring of a *mule*, and the conversion of "*said horse*," though probably a mistake on the part of the pleader, is a fatal inaccuracy, that may be taken advantage of on motion in arrest of judgment.

Appeal from District Court, Harrison County; Hon Richard B. Levy, Judge.

Richard Duncan, convicted of conversion, appeals. Reversed.

Robt. A. John, Assistant Attorney General, for the State.

DAVIDSON, P. J. The charging part of this indictment is, that appellant "did then and there have possession of a mule then and there the property of Joe Taylor, by virtue of his contract of hiring with said Joe Taylor, and did then and there unlawfully, and without the consent of the said Joe Taylor, the owner thereof, fraudulently convert said horse to his, the said Richard Duncan's, own use."

This indictment was framed under the article of the Penal Code which denounces a punishment for the conversion of prop-

erty held under a contract of borrowing or hiring, and is attacked because appellant is charged with having hired a mule and converted a horse; in other words, that appellant is charged with the conversion of an animal the possession of which is not alleged, and the hiring of which is not averred. This mistake may have been an oversight in the pleader. But, in order to constitute the offense sought to be charged, the party must convert the animal in his possession by virtue of his contract of hiring, and this must be properly alleged in the indictment. A party could not have possession of a mule by virtue of a contract of hiring, and be convicted for converting a horse. The motion in arrest of judgment should have been sustained.

Because of this defect in the indictment, the judgment is reversed, and the prosecution ordered dismissed.

SHARP V. STATE.

61 Neb. 187—85 N. W. Rep. 33.

Decided January 23, 1901.

INFORMATION—LOCAL JURISDICTION—FORMER JEOPARDY: *Verification on information and belief—Plea that same matter had been tried in another county—Burglary and larceny—Jurisdiction as to stolen goods carried from one county to another—Other questions.*

1. A clerk of the District Court may properly take verifications of information in criminal cases.
2. It is sufficient if an information is verified by the county attorney on information and belief.
3. It is unnecessary to obtain leave of court before filing an information in a criminal case.
4. An information charging larceny insufficiently described the stolen property as "fifty-five coats, each coat of the value of five dollars; fifty-five vests, each vest of the value of three dollars; sixty pairs of trousers, each of the value of five dollars; four overcoats, each of the value of ten dollars."
5. The crime of burglary, and the larceny resulting therefrom, are not so connected in law as to preclude a conviction for larceny merely because the accused may have been prosecuted for the burglary, resulting in a mistrial.
6. Whether a mistrial resulting from the discharge of a jury because

of the illness of one of its members constituted former jeopardy, not decided.

7. Proof of special ownership in property, the subject of larceny, will sustain a conviction of larceny under an information charging general ownership.
8. Evidence examined, and *held* to establish the existence of a *de facto* corporation.
9. Other objections examined, and *held* not to constitute error. (Syllabus by the Court.)

Supreme Court of Nebraska.

Error to District Court, Lancaster County; Hon. Frost, Judge.

Charles Sharp, convicted of larceny, brings error. Affirmed.

C. L. Hover and John O. Yeiser, for plaintiff in error.

Constantine J. Smyth, Attorney General, *Willis D. Oldham*, Deputy, and *Thomas C. Munger*, *contra*.

NORVAL, C. J. Charles Sharp was convicted in the District Court of Lancaster County of the crime of larceny. Prior to his arrest he had been apprehended in Sarpy County on an information charging burglary by breaking into a certain railway car, with intent to steal personal property therein contained. For this latter offense he had been tried twice before his prosecution for the larceny. The first trial resulted in a mistrial. On the second the jury was discharged on account of the sickness of a member. Afterwards occurred his arrest in Lancaster County; he being charged with larceny of the goods contained in said car; such goods having by him been removed into Lancaster County. After his arrest for larceny the charge of burglary was *nolled* by the county attorney of Sarpy County. He was convicted of the crime of larceny in Lancaster County, and comes to this court from such judgment, on error. The numerous specifications of error will be considered in the order presented in his brief.

The information on which the conviction was had was sworn to before the clerk of the District Court. Counsel for the accused urged that this officer has no authority so to do, and that the court below erred in overruling a motion to quash the information made on that ground. This court decided to the contrary in *State v. Lauver*, 26 Neb. 757, 42 N. W. 762. The clerk of the District Court is a judicial officer, within the mean-

ing of the sections of the Criminal Code under consideration. Section 36, c. 19, Comp. St., provides that all courts have power to administer oaths, either by any judge, justice, or clerk thereof. The act of the clerk in administering the oath is therefore only that of a judicial officer. The cases cited by counsel as upholding the rule that a clerk of the District Court is not a judicial officer are those decided by this court wherein informations have been sworn to before notaries public—officers unknown to common law—and such cases are not in point.

The verification of the information, which was by the county attorney, was upon information and belief only. This is urged as error, a motion to quash for that reason having been overruled. We do not think there was any error in the ruling. The conclusion reached in *Richards v. State*, 22 Neb. 145, 34 N. W. 346, is to the contrary. It is contended that this part of the decision is a *dictum*. We cannot agree with counsel, and are satisfied with the rule. It would be unreasonable to require prosecuting officers to verify such pleadings positively, as it is not to be presumed that they have personal knowledge of the facts therein alleged. Except in extremely rare instances, a prosecuting officer acts solely upon evidence of third parties—at most, he can have only an opinion or belief of the truth of the allegations. Such opinion or belief may have for its base the evidence of witnesses, yet it is an opinion or belief only. It was certainly not the intention of the legislature that he should verify informations only in cases where he had personal knowledge of the facts alleged. His statement in an affidavit that the facts alleged are true, when such statement is based solely upon evidence derived from other sources than his personal knowledge, is as much an opinion—a belief—as would be his statement that he “believed” the allegations to be true. In either form it would be an opinion only, in 99 cases out of 100, unless we infer that the legislature intended to restrict the power of the prosecuting officer to cases only where he had personal knowledge of the facts. The verification is sufficient in that form, if made by the prosecuting officer, *Washburn v. People*, 10 Mich. 372; 1 Bish. New Cr. Proc. § 713, and cases cited.

Error is predicated upon the fact that the information was filed by the Prosecuting Attorney without having first obtained leave of court so to do. No cases are cited upholding so seemingly absurd a rule. Neither is any reason advanced, except by

way of a sort of analogy between this and the presentation of an indictment by a grand jury. We fail to find any real analogy existing between the two means of charging crimes, which would lead us to believe that a rule of the kind contended for is necessary to protect individuals in the exercise of their personal rights. No such practice, to our knowledge, is or even has been in operation in the State, and we see no reason why it should be.

It is urged that the description of the property alleged to have been the subject of the larceny is not sufficient, and that the court erred in refusing to quash the information for that reason. The property was described in the information as "fifty-five coats, each coat of the value of five dollars; fifty-five vests, each vest of the value of three dollars; sixty pairs of trousers, each of the value of five dollars; four overcoats, each of the value of ten dollars." The description of the property, as above quoted, is sufficient, as will appear from the case of *Barnes v. State*, 40 Neb. 545, 59 N. W. 125, and the authorities therein cited.

A plea in abatement was entered, setting up his arrest and trial upon the charge of burglary as a bar to this action, which plea the court overruled, and error is predicated on such ruling. It is conceded that under the rule of this court announced in *Hurlburt v. State*, 52 Neb. 428, 72 N. W. 471, the District Court of Lancaster County had jurisdiction to try him for larceny—the goods stolen in Sarpy County having been by him removed to Lancaster County—were it not that the District Court of Sarpy County had already taken jurisdiction of the charge of burglary, which act, it is claimed, deprived the District Court of Lancaster County of jurisdiction. In other words, it is claimed that the two acts of burglary and larceny are so connected in law as to constitute one transaction, and that the court first exercising jurisdiction over the one charge will deprive any other court of jurisdiction over the other, because of the statement of the rule in the *Hurlburt Case*, *supra*, that when property is stolen in one county, and it is afterwards found in possession of the thief in another county, he may be prosecuted and convicted in either county, but not in both. With the contention of counsel we cannot agree, either regarding the weight of authority, or from the standpoint of logic. The overwhelming weight of authority is to the contrary. *State v. Ingalls*

(Iowa) 68 N. W. 445; *Josslyn v. Com.*, 6 Metc. (Mass.) 236; *State v. Warner*, 14 Ind. 572; *Wilson v. State*, 24 Conn. 56; *Howard v. State*, 8 Tex. App. 447; *People v. Parrow*, 80 Mich. 567, 45 N. W. 514; *State v. Kelsoe*, 76 Mo. 505.

Sound reason also upholds the proposition that the burglary and the larceny are not so connected as to make them one transaction. The mere fact that they are committed at nearly the same time does not necessarily so connect them. A burglary may exist without any larceny having been committed. So may a larceny have existed without a burglary having been committed. It is never necessary to prove a burglary in order to establish the guilt of one accused of the crime of larceny. Nor is there any necessity to ever prove a larceny, for any other purpose than to show intent in cases of burglary. There is a manifest fallacy in arguing that mere propinquity of time constitutes a necessary connection between the two acts, so much so as to make them one transaction in law. On the contrary, they are distinct and separate crimes, neither of which is necessary to the other, so far as their essential criminal features are concerned. The fact that the District Court of Sarpy County had taken jurisdiction of the burglary, therefore, in no manner deprived the District Court of Lancaster County of jurisdiction over the crime of larceny.

The defendant alleged as a bar to this action his trial in Sarpy County on the charge of burglary. Our view of the matter of the connection of the two crimes, as already set forth, renders it unnecessary to comment further on this point. It is not well taken, whether there was or was not a former jeopardy.

In the information the goods stolen were alleged generally to have been the property of the railway company, and the evidence established a special ownership only—that of a common carrier. While it is admitted that a special ownership is sufficient to sustain a conviction of larceny, it is urged that such special ownership must be alleged, otherwise the variance is fatal. No valid reason lies at the bottom of this contention. Counsel seems to rest their argument upon decisions of this court in replevin cases where it is held that, if a special property is relied upon, it must be so stated in the affidavit; but this is specifically required by statute in such cases. See section 182, Code Civ. Proc. We are aware of no such restric-

tions in cases like the one at bar, or of decisions holding such allegations to be necessary in the absence of a specific statutory requirement.

The railway company alleged to be the owner of the property stolen was averred to be a corporation, and it is contended that such corporate existence was not proven. An examination of the record convinces us that sufficient evidence was adduced to establish a *de facto* corporation, within the rule announced in *Braithwait v. State*, 28 Neb. 832, 45 N. W. 247.

A witness for the State was asked on cross-examination if he had been convicted of a felony, to which he returned an affirmative answer. Defense then asked him of what particular charge of felony he had been convicted. To this objection was made by the State, and was sustained. This ruling is urged as error. As counsel for defendant adduce no reason or authority to sustain the contention, and we can imagine no reason, or believe that the ruling could have been prejudicial, we must conclude that the objection is frivolous. Numerous objections to admission of evidence are made, all of which, on examination, we pronounce without merit.

Certain misconduct on the part of the prosecuting officer during the trial is alleged. Without going into particulars, it is sufficient to state that the matters set out have been decided to the contrary in numerous well-considered cases by this court, and there exists no reason to depart from them. Other objections are raised, all of which have been carefully considered, but none of them are of sufficient importance to merit the attention of the court, further than the observation that they are not well taken. The defendant had a fair trial, his conviction was an act of justice, there are no errors in the record, and the judgment of the lower court is affirmed.

Note (By J. F. G.)—At first glance this opinion may seem at variance with that in *Herdman v. State*, 54 Neb. 626; 74 N. W. Rep. 1097; 11 Amer. Crim. Rep. 298, where an attachment for contempt was held insufficient because based on an affidavit made on information and belief. It is undoubtedly true that an *affidavit* on which a warrant or *capias* issues must be one on which perjury can be assigned. This rule is recognized by section 7 of the Nebraska Bill of Rights which requires an "oath of affirmation" as a basis for a warrant. However, under section 8340 of the Neb. R. S. it appears that an information by a District Attorney is not permitted until after a hearing before a committing magistrate.

As to complaints and affidavits on information and belief, consult subject of CRIMINAL COMPLAINTS in the Table of Topics; also, 11 Amer. Crim. Rep. pp. 349, 356, 372, 373, 374 and 380.

STATE v. KERNS.

47 W. Va. 266—34 S. E. Rep. 734.

Decided December 2, 1899.

INSTRUCTIONS—INVADING THE PROVINCE OF THE JURY: *Instruction which by accentuation or tone might prejudice the jurors as to matters of fact, presumed prejudicial—Danger of jurors to find guilty on moral principles when the evidence does not justify a verdict of guilty—Duty of a trial judge to conceal from the jury his opinions on questions of fact—Judicial proceedings must be governed by the law of the land—Right of the accused to have the law clearly stated to the jury.*

1. Instructions given by the trial court, on its motion, in a felony case, which may convey to the jury the opinion of the court as to the guilt of the accused, are improper.
2. Instructions asked by the accused which properly propound the law, are justified by the evidence, and present to the jury a phase of the case not presented in other instructions, should be given, and it is reversible error to refuse them.
(Syllabus by the Court.)
3. The following instruction held to be reversible error:
"Of course, gentlemen, you could find the defendant not guilty at all, if you thought the evidence justified such a finding; but in all your findings, you must be governed by the evidence."
4. Accentuation may make words, otherwise harmless, very prejudicial, and as accent and manner cannot be shown in the record, that which may have been prejudicial is ground for new trial.
5. "Too often jurors of this country, actuated by a sense of natural justice, forget the limitations of the laws by which they are governed, and, in their anxiety to punish an offender against the higher laws of morality and decency according to his just deserts, inflict on him for a wrong the law does not punish, the penalty for a crime of which he is not guilty."
6. In the administration of the law, the courts must be governed by the law of the land.
(Additional syllabus by J. F. G.)

Supreme Court of Appeals of West Virginia.

Error to Circuit Court, Tucker County; Hon. John Horner Holt, Judge.

Fred D. Kerns, found guilty of murder, brings error. Reversed.

W. H. Kelley and J. P. Scott, for the plaintiff in error.

Edgar P. Rucker, Attorney General, *Wm. G. Gonley*, and *E. M. Keatley*, for the State.

DENT, President.

At a circuit court held for the County of Tucker on Thursday, the 22d day of June, 1899, Fred D. Kerns, on the verdict of a jury, was sentenced to the penitentiary for the period of his natural life for killing Lucy Day. His defense was, "Not guilty." The facts are as follows: The prisoner and the deceased were lovers. She was single. He was married, but had been some time parted from his wife, from whom he was seeking a divorce, with the ostensible object of marrying the deceased. She believed him to be single, and expected him to marry her. Their intimacy had continued for a considerable period, and resulted in sexual cohabitation between them. At the time of her death he was visiting at her parents' home, and they occupied the same room and bed. She was pregnant. About twenty minutes of 12 o'clock, midnight, the report of a revolver was heard in their room. Mrs. Day, her mother, immediately entered the room, and found her lying on the bed, and the prisoner standing up. He said: "Mother, Lucy has shot herself. Oh, what shall I do? Oh, my God! what have I done?" To the brother coming in, he says: "Riley, here is the revolver. Shoot me, shoot me, shoot me." The prisoner stated that he was asleep, when the report of the revolver awakened him, and Lucy fell back on him; that he immediately got up, laying her back on the bed, and then her mother came in. The revolver belonged to Lucy, who kept it loaded in her trunk, with the key tied to a string around her neck. It is evidenced by one witness that on that evening he saw her take it out of her trunk and hide it about her person. The wound was directly over the heart, was burned and blackened with powder, and no blood flowed therefrom, while she lay as if sleeping. The revolver was found lying on the bed. There are many other little matters of detail brought out in the evidence which are not necessary to repeat here, as no comment

on the weight of the evidence is intended. The question submitted to the jury was as to whether she committed suicide, or was killed by the prisoner.

At the instance of the State the court gave the following instruction, to which the prisoner objected, to-wit:

"The court instructs the jury that the term 'reasonable doubt' does not mean every vague conjectural doubt, but it is a substantial doubt—a reasonable hypothesis—arising from the evidence or lack of evidence inconsistent with the theory of the defendant's guilt."

The court refused the following instruction asked by the prisoner:

"The court further instructs the jury that, if any one of the facts necessary to show the guilt of the defendant is consistent with his innocence, then the jury must acquit." These instructions are equally intelligible to a jury composed of ordinary men and too many lawyers, and there is no good reason why the jury should not have them. If they have doubts of their meaning, they should give the prisoner, and not the State, the benefit of the doubt. With this understanding, it does not appear even doubtful that either the giving or the withholding of either of these instructions would deprive the prisoner of a fair trial. They both apparently propound the law correctly to a jurist, when carefully sifted and rightly understood, but what effect they might have to mislead and puzzle the mind of a jurymen is beyond the pale of judicial discernment. The last instruction is easily understood to mean that, if there is a weak link in the chain of evidence necessary to convict, the prisoner is entitled to the benefit of the doubt thereby raised. This is undoubtedly true, and the instruction properly propounds the law; and the court, having given the State's instruction, should have given the prisoner's. The jury could as easily understand the one as the other, and thus arrive at the true hypothesis. *State v. Flanagan*, 26 W. Va. 117.

When the jury was about to be sent to its room, "the court, on its own motion, taking the indictment in his hand, instructed the jury in the following words, to-wit: 'Gentlemen of the Jury: I think it would be proper for me to say to you that, if you should find the defendant guilty of murder in the first degree, you could further determine the mode of punishment, and say whether it should be by death, or confinement

in the penitentiary for life. If you should determine that he ought to be confined in the penitentiary, you will make that a part of your finding and of your verdict. You can, under the indictment, find the defendant guilty of murder in the second degree.' Thereupon, the jury being about to retire, the counsel for the defendant suggested to the court that he ought also to say to the jury that the jury could find the defendant not guilty; and thereupon the court said to the jury: 'Of course, gentlemen, you could find the prisoner not guilty at all, if you thought the evidence justified such a finding; but in all your findings you must be governed by the evidence.'" To these remarks of the court the prisoner objected. These words might be very harmless, or they might be disastrous to the prisoner, according to the accent and manner of the court in using them. They might very easily be made to convey the sense that the court was fully convinced of the guilt of the prisoner, and for the jury to find otherwise they must disregard the evidence. Manner and accent cannot be made part of the record, and such language, uttered at the time it was, could be made very suggestive to the jury—at least, from which they could draw their own inferences as to the opinion entertained by the court. Hence the rule that, if such instructions or remarks may have prejudiced the prisoner, they are sufficient grounds or error to justify the granting of a new trial. *State v. Staley* (W. Va.) 32 S. E. 198; *Neill v. Produce Co.*, 38 W. Va. 228, 18 S. E. 563; *State v. Cobbs*, 40 W. Va. 721, 22 S. E. 310; *State v. Sulfin*, 22 W. Va. 771; *State v. Greer, Id.* 800; *State v. Hurst*, 11 W. Va. 54; *McDowell's Ex'r v. Crawford*, 11 Grat. 405. In *Dejarnette v. Com.*, 75 Va. 867, it was held that "no remarks which have a tendency to intimate the bias of the court on the character or weight of the testimony should be indulged in by it." "The right to a decision on the facts by the jury uninfluenced and unbiased by the opinion of the judge has been deemed worthy of a constitutional guaranty. It cannot be lawfully denied by the simple evasion of looking at the counsel, instead of at the jury." *State v. Harkin*, 7 Nev. 381. "From the high and authoritative position of a judge presiding at a trial before jury, his influence with them is of vast extent; and he has it in his power, by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties." *McMinn v. Whelan*, 27 Cal. 300, 319. The

trial judge should exercise great care not to intimate in any manner his opinion upon any fact at issue. He cannot do so directly or indirectly, neither explicitly nor by *innuendo*. *State v. Dick*, 60 N. C. 440; *State v. Ah Tong*, 7 Nev. 152. Words in themselves may be harmless, while accent and manner may make them deadly. It was proper for the court to say that, if the jury believed the prisoner not guilty, they had the right to so find; but to intimate to them in any manner, by words, conduct, or accent, that such finding on their part was not justified by the evidence by which they must be governed, was improper, and prejudicial to the prisoner's guaranteed right of a fair trial.

The judge refused to give three several instructions in the following words, asked by the prisoner, to-wit:

"Before the jury can convict the defendant, it must be shown beyond a reasonable doubt that Lucy Day did not kill herself, and that the defendant did kill her." "Unless the evidence proves beyond any reasonable doubt that the prisoner killed the deceased, Lucy Day, and that said Lucy Day did not kill herself, then the jury must acquit the defendant." "The court further instructs the jury that if, after considering all the evidence and circumstances, they have a reasonable doubt as to whether the defendant, Kerns, shot and killed the deceased, or whether she shot and killed herself, then they must give the defendant the benefit of such doubt, and acquit him." The State insists that it was not error to refuse to give these instructions, for the reason that there was no evidence justifying them, and because the usual reasonable doubt instructions had been given. The object in offering these instructions, no doubt, was to bring plainly to the attention of the jury the question as to whether Lucy Day had committed suicide. The instructions in themselves were right, for, if the jury had a reasonable doubt in their minds as to whether the deceased had committed suicide, then they necessarily had the same reasonable doubt as to whether the prisoner killed her. If the prisoner had asked the court to instruct the jury that unless they believed from the evidence, beyond a reasonable doubt, that Lucy Day did not shoot herself, they must acquit the prisoner, the court would have been bound to give it, because, if she shot herself, he did not shoot her. The instructions asked were simply to this effect, and there is apparently no excuse for their not be-

ing given. The prisoner had the right to have the question of suicide fairly presented to the jury, as there is much evidence tending to sustain it. There is no question but that a married man who deceives and seduces under the promise of marriage an innocent and confiding girl, and drives her to suicide, is worthy to suffer the highest punishment known to the law. Our laws are not so written, but this most heinous offense against society is allowed to go comparatively unpunished, for which the more righteous laws of the ancient Hebrews inflicted the death penalty. Too often the jurors of this country, actuated by a sense of natural justice, forget the limitations of the laws by which they are governed, and, in their anxiety to punish an offender against the higher laws of morality and decency according to his just deserts, inflict on him for a wrong the law does not punish the penalty for a crime of which he is not guilty. What more natural is it for a jury to say in a case of this character: "Lucy Day may have killed herself, and we have the most serious and reasonable doubts as to that fact; but this prisoner deceived her, seduced her, robbed her of everything worth living for, and drove her to the maddening crime of suicide to hide her shame and prevent her unborn offspring from being bastardized. Doubts or no doubts as to his guilt, he should suffer the full penalty of the law." And while all honorable men might hold up their hands and say: "So say we all. The verdict is a righteous one"—yet the courts of the land must be governed by the laws of the land, which speak in no uncertain terms. If Lucy Day took her own life, it matters not what her provocation may have been, or how cruelly wicked and wrongful may have been the conduct of the prisoner in driving her to such a course, yet he cannot be punished for her death, but he must be remitted to the bar of that higher court whose judgments are infallible. The refusal to give these instructions cannot be accounted for except upon the theory that the trial court deemed him worthy of punishment, and that the burden was upon him to show that Lucy Day did commit suicide, and not on the State to show that she did not. They are, however, so interchangeable that to disprove one we must prove the other, and to prove one disprove the other. A reasonable doubt about one is a reasonable doubt about the other. It may be argued that the instruction given was, therefore, sufficient, as it necessarily involved those re-

fused. The given instructions made no reference to the matter of suicide, and for this very reason the jury may have considered it abandoned, and given it little or no consideration. Hence the prisoner had the right to have the matter of suicide brought prominently to the attention of the jury by proper instructions. He asked for these, and the court refused to give them. This was error by which he might be prejudiced, and this court is unable to say that he would not be. If a court is asked to give a proper specific instruction, it must do so, unless such instruction is fully and completely met by other instructions given. *State v. Cobbs*, 40 W. Va. 718, 22 S. E. 310; *State v. Allen* (W. Va.) 30 S. E. 209; *State v. Musgrave*, 43 W. Va. 672, 28 S. E. 813; *State v. Evans*, 33 W. Va. 417, 10 S. E. 792.

There are some other grounds of error relied upon, which are, however, of minor importance, compared with the foregoing, and which on a retrial may be determined rightly, or prove unnecessary. The judgment is reversed, the verdict of the jury set aside, and a new trial awarded the accused, and the case remanded for this purpose.

BRANNON, J. I concur in Judge DENT's ruling as to the instructions, except that one given by the judge. Adhering to opinions heretofore written by me, I do not regard that instruction as error. I intimate no opinion as to the guilt or innocence of the accused.

McWHORTER, J. I concur in the conclusion that the judgment should be reversed, the verdict set aside, and a new trial granted, and fully agree that "no remarks which have a tendency to intimate the bias of the court on the character or weight of the testimony should be indulged in by it," as held in *Dejarnette v. Com.*, 75 Va. 867; but I contend that, in the absence of objections or exceptions entered to the "accent and manner of the court in using" such words or remarks, the Appellate Court cannot assume that the trial judge, either by accent or manner in the use thereof, may have suggested to the jury his bias as to the weight of the evidence. It must be presumed that the remarks made or words spoken by the court were without bias one way or the other, and there should not be attributed to them a meaning which the words themselves do not impart.

BRANNON, J., concurs in this note.

STATE v. INTOXICATING LIQUORS, ETC.

94 Me. 335—47 Atl. Rep. 531.

Decided September 21, 1900.

INTERSTATE COMMERCE—INTOXICATING LIQUORS: *Act of Congress, known as "Wilson Act" construed—Clause in a statute of Maine, interfering with interstate commerce, unconstitutional.*

1. The "Wilson Act" of Congress, which in legislating upon interstate commerce in intoxicating liquors, provides that all such liquors transported into any State or Territory, for use, consumption, storage or sale, shall upon the arrival therein be subject to the laws of such State or Territory, the same as though manufactured therein, does not confer authority on a State to proceed while the goods are in transit under a shipment from another State or Territory.
2. While Federal authority continues to recognize intoxicating liquors as a legitimate subject of interstate commerce, the clause in the statutes of Maine, which declares that "no person shall bring into the State * * * * intoxicating liquor with intent to sell the same in the State in violation of law," must be held inoperative as repugnant to the Constitution of the United States.
3. The intoxicating liquor in question was shipped, with a continuous way-bill, from Portsmouth, N. H., over the Boston & Maine, and the Grand Trunk Railways, consigned to a person in Lewistown, Maine. While the car was on a siding at Auburn, it was seized by the Auburn police officers, taken from the car and removed to the depository for seized liquors. The Grand Trunk Railway Company intervened and claimed the property. *Held*, that the liquors were still in the course of transportation and were not subject to the law of the State of Maine.
4. *Rhodes v. Iowa*, 170 U. S. 412, followed. The question as to whether the liquors would remain a subject of interstate commerce after notice to the consignee, and a reasonable time elapsing, not arising in the case, is not passed upon.

Supreme Judicial Court of Maine.

Appeal from the Supreme Judicial Court, Cumberland County.

Proceedings of search and seizure were instituted in the Municipal Court of Auburn, and certain liquors seized. The Grand Trunk Railway Company of Canada intervened and claimed the liquors; but the court declared the liquors forfeited. The claimant appealed. Judgment for the claimant.

The claim for the possession of the liquors, as filed, was as follows:

"And now comes the Grand Trunk Railway Company of Canada, a corporation created and existing under the laws of the Dominion of Canada, and a citizen of said Dominion of Canada, said corporation being a common carrier, and specifically claims the right, title, and possession in the items of property hereinafter named, as having a right to the possession thereof at the time when the same were seized.

"And the foundation of said claim is that they were in possession of said Grand Trunk Railway Company of Canada, and were in transit from Portsmouth, in the State of New Hampshire, to Lewiston, in the State of Maine, and were taken from the lawful possession of said the Grand Trunk Railway of Canada on the sixth day of October, A. D. 1899, from a box car standing on said company's track near the depot of said company, situated on the east side of Main street, in Auburn, in the County of Androscoggin, by Fred L. Austin, one of the constables of said Auburn, and this claimant declares that said items of property were not so kept or deposited for unlawful sale, as is alleged in the libel of said Fred L. Austin and in the monition issued thereon. The property claimed as aforesaid is as follows:

"One barrel containing thirty-two (32) gallons of ale, marked Defunct Moneul, Lewiston, Maine.

"Dated at Auburn, in said county, this nineteenth day of October, in the year of our Lord one thousand eight hundred and ninety-nine.

"The Grand Trunk Railway Company of Canada,
"By JAMES A. BYRON, its Agent."

C. A. and L. L. Hight, for the claimant.
George E. McCann, County Attorney, for the State.

Sitting: WISWELL, C. J., HASKELL, WHITEHOUSE, STROUT.
SAVAGE, POWERS, JJ.

WHITEHOUSE, J. This case comes to the law court on the following agreed statement of facts:

"The liquor concerned in this case had been shipped at Portsmouth, New Hampshire, via Boston & Maine Railroad and Grand Trunk Railway, accompanied by a continuous way-

bill, and was consigned to a person in Lewiston, Maine. While in transit, and before delivery to consignee, it was seized by the police officers at Auburn.

"On the night of October 6, A. D. 1899, a car containing the intoxicating liquors in question, while in the ordinary course of transportation, was attached to Grand Trunk train No. 43 at Lewiston Junction, and was drawn thence to the city of Auburn. There, to secure the convenience of passengers, and to enable them to alight at the station platform at Lewiston, this car was left standing on the siding. When the passenger coaches had been taken to the passenger station at Lewiston, the engine and crew returned to the siding at Auburn for the purpose of removing this car to the freight house track in Lewiston, where the liquors were to have been delivered to the consignee.

"The liquor had been shipped by a brewery company doing business at Portsmouth, in the State of New Hampshire, and was being carried, accompanied by a continuous waybill, issued by the Boston & Maine Railroad at Portsmouth, from said Portsmouth, by way of the Boston & Maine Railroad, to Portland, and thence, by way of the Grand Trunk Railway, to Lewiston. While it was standing on the siding at Auburn it was seized by the Auburn police officers, taken from the car, and removed to the depository where seized liquors are kept. At the time of its seizure it was in transit, not having reached its destination nor having been delivered to the consignee."

It was contended by the Grand Trunk Railway Company of Canada that the seizure of this liquor by the police officers of Auburn, before its delivery to the consignee, was in violation of the third clause of section 8 of the first article of the Constitution of the United States, conferring upon Congress the power "to regulate commerce with foreign nations and among the several States." But the judge of the Municipal Court held that the seizure was legal, and declared the liquor forfeited. From this decision the claimant appealed to the Supreme Judicial Court.

It is manifest that the seizure of the liquor in question, under the circumstances disclosed in the agreed statement of facts, must be justified, if at all, by the provisions of section 31 of chapter 27 of the Revised Statutes of Maine, and of chapter

728 of the Act of Congress of August 8, 1890. Section 31, c. 27, Rev. St., is as follows:

"No person shall knowingly bring into the State, or knowingly transport from place to place in the State, any intoxicating liquors with intent to sell the same in the State in violation of law, or with intent that the same shall be so sold by any person, or to aid any person in such sale, under a penalty of fifty dollars for each offense. All such liquors intended for unlawful sale in the State may be seized while in transit and proceeded against, the same as if they were unlawfully kept and deposited in any place."

The Act of Congress of August 8, 1890, commonly known as the "Wilson Act," is in these terms:

"All fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

It is insisted, however, in behalf of the claimant, that, inasmuch as the transportation of intoxicating liquors from one State to another is declared to be interstate commerce, the regulation of which has been committed to Congress by the Federal Constitution (*Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. ed. 700), any construction of these statutes which would authorize a seizure of liquors under the circumstances disclosed in the case at bar would give to the statute of Maine an extraterritorial operation, and to that extent render the act repugnant to the Constitution of the United States, as hereinbefore stated.

The *Bowman Case*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. ed. 700, decided before the passage of the Wilson Act of August 8, 1890, was an action to recover damages against a railway company for refusing to carry the liquor in question from Illinois into Iowa. In defense the company sought to justify its refusal by the provisions of the Iowa statute which prohibited the delivery of intoxicating liquors within that

State. But it was the opinion of a majority of the court that the transportation of such liquors from one State into and across another was interstate commerce, and as such was protected from the operation of State laws from the moment of shipment until the act of transportation was terminated. It was accordingly held, although by a divided court, that the statute of Iowa of the same scope and effect as the Maine statute above quoted, so far as it affected interstate commerce, was repugnant to the Constitution of the United States and void.

In *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. ed. 128, announced two years later, but prior to the passage of the Wilson act of 1890, it was held, also by a divided court, three justices dissenting, that the right to sell the imported liquor in the original packages, free from interference by State laws, was also protected by the Federal Constitution, as by the act of sale alone the merchandise would become mingled with the common mass of property in the State. "Up to that point of time," say the court, "we hold that, in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the foreign or nonresident importer. * * * The responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

Thereupon Congress promptly interposed by enacting the Wilson law above quoted, declaring that all such liquors transported into any state "shall, upon arrival in such State, * * * be subject to the operation and effect of the laws of such State."

But, recognizing the paramount authority of the Federal decisions upon this subject, our own court announced its judgments in two cases which had arisen prior to the passage of the Wilson Act, viz.: *State v. Intoxicating Liquors*, 82 Me. 558, 19 Atl. 913, and *State v. Intoxicating Liquors*, 83 Me. 158, 21 Atl. 840.

The construction of the Wilson Act was not determined by the Supreme Court of the United States until it was brought directly in question in the case of *Rhodes v. Iowa*, 170 U. S.

412, 18 Sup. Ct. 604, 42 L. ed. 1088. In that case the intoxicating liquor in question was transported under a continuous waybill from Illinois to a point in Iowa by one line of railway, and thence by another line of railway, wholly within the latter State, the place of its destination. The package had been removed from the car and deposited on the platform by the trainmen. It was then carried by the plaintiff, the station agent at that point, into the freight warehouse, where it remained about an hour, when it was seized by a constable under a search warrant. For this act of moving the goods from the platform to the freight house the plaintiff in error was convicted in the State court, under the statute of Iowa, of unlawfully conveying intoxicating liquor "from one place to another in the State." Whether the consignee had actual notice of the arrival of the package, and a reasonable opportunity to remove it from the freight warehouse before the seizure, did not appear. It was held by the Federal court, again divided, three justices dissenting, that this conviction was erroneous, for the reason that the act of the plaintiff in thus moving the package was a part of the interstate commerce transportation, and was performed before the law of Iowa could constitutionally attach to it. In the majority opinion it is said: "We think that, interpreting the statute by the light of all its provisions, it was not intended to, and did not cause the power of the State to, attach to an interstate commerce shipment while the merchandise was in transit under such shipment, and until its arrival at the point of destination, and delivery there to the consignee."

Whether, after actual notice to the consignee of the receipt of the goods in the freight warehouse, and neglect on his part to remove them after the lapse of a reasonable time, the warehouseman may, under some circumstances, be deemed to hold them as agent of the consignee, and the act of interstate commerce accordingly be held complete, is a question which was not considered by the Federal court. Nor does it arise in the case at bar; for it distinctly appears here that the liquor was seized by the police officers in the cars of the railway company while it was standing on the siding at Auburn before it had reached its destination in Lewiston, and it is expressly conceded in the agreed statement of facts that the seizure was made while the liquor "was in transit, and before its delivery to the consignee."

It follows that, upon the authority of *Rhodes v. Iowa, supra*, this seizure was made while the liquor continued to be an interstate shipment, before the transportation of it had terminated, and before it had become subject to the operation of the law of the State of Maine. The seizure was therefore premature and unauthorized.

The observation of Chief Justice Peters in *State v. Burns*, 82 Me. 558, 19 Atl. 913, respecting the Federal case of *Leisy v. Hardin, supra*, is equally applicable to *Rhodes v. Iowa*, above cited: "The opinion of a minority of the court sitting in that case appears to be very elaborate and exhaustive of the question involved, and may commend itself to many as containing the better conclusion. Our obedience is due, however, to the judgment which prevails."

While, therefore, intoxicating liquor continues to be recognized by Federal authority as a legitimate subject of interstate commerce, that clause of section 31 of chapter 27 of the Revised Statutes of Maine, which declares that "no person shall knowingly bring into the State * * * any intoxicating liquor, with intent to sell the same in the State in violation of law," must be held inoperative, as repugnant to the Constitution of the United States.

The entry must therefore be—

Judgment for the claimant.

Order for return of liquors to issue.

EX PARTE GRAHAM.

43 Tex. Crim. Rep. 463—96 Am. St. Rep. 884—66 S. W. Rep. 840.

February 19, 1902.

JUDGE: *Jeopardy does not attach in a trial before a disqualified judge—The trial is a nullity and the verdict and judgment do not furnish a criterion as to bail.*

1. A trial before a disqualified judge is a void proceeding, and would not sustain a plea of former jeopardy.
2. The relator had been tried for murder and found guilty of murder in the second degree; but the case was reversed because of the disqualification of the trial judge. He then applied for bail

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which was refused in the lower court. *Held*, that although the Constitution authorizes bail in all cases, except where the proof is evident, that the first trial being a nullity, the court, under the evidence, did not err in denying bail.

Court of Appeals of Texas.

Appeal from the District Court of Robertson County; Hon. Sam R. Scott, Special Judge.

Eugene Graham, being denied bail on a writ of *habeas corpus*, appeals. Affirmed.

The evidence indicated, that the accused had advised a deliberate murder and was present at its commission.

No brief on file for the appellant.

Robert A. John, Assistant Attorney General, for the State.

BROOKS, J. Relator applied for the writ of *habeas corpus* before Hon. Sam R. Scott, special judge duly appointed by the governor to try this case. The hearing was originally had in Falls County, bail being denied. The case was appealed to this court, and reversed, the application being ordered heard in Robertson County. *Ex parte Graham* (Tyler term, 1901) 64 S. W. 932. In pursuance of that order the case was heard in Robertson County, bail being denied, and relator remanded to custody, and this appeal is prosecuted.

It appears that relator has heretofore been tried, the jury finding him guilty of murder in the second degree. At that trial Hon. John L. Goodman presided as special judge. Upon the appeal of the case we held that the judge was disqualified, and because of his disqualification the judgment was reversed. On that appeal we said: "The trial judge being disqualified, as indicated above, the whole proceeding became an absolute nullity, and judgment void, and the cause stands upon the docket of the District Court of Robertson County as if the proceeding complained of in this record had never occurred." *Graham v. State*, Ante, page 110; 63 S. W. 558, 2 Tex. Ct. Rep. 822. A void judgment would not sustain a plea of former jeopardy to any offense. *Ogle v. State*, Ante, page 219; 63 S. W. 1009, 2 Tex. Ct. Rep. 960. The Constitution authorizes bail in all cases where the proof is not evident. We have carefully examined this record, and considered the evidence ad-

duced, and are of opinion that the judgment of the lower court denying relator bail is correct.

The judgment is affirmed.

NOTE.—The opinion in the previous chapter of this case, as above referred to, is of date October 30, 1901, and is reported in 64 S. W. Rep. (932) as follows:

BROOKS, J. This is an appeal from refusal of bail under writ of *habeas corpus* proceeding. Appellant was indicted in Robertson County for murder. He prosecuted his appeal from conviction, and the judgment was reversed. Being called for trial again in the District Court of Robertson County, change of venue was had to Falls County. Subsequent to the change of venue, appellant applied for bail. The writ was granted, and made returnable before Judge Scott in Falls County. Upon the hearing of the writ bail was refused, and this appeal prosecuted. Our statute provides that, after indictment found, the writ of *habeas corpus* shall be returnable in the county where the offense was committed. Code Cr. Prac. art. 137. *Ex parte Trader*, 24 Tex. App. 393, 6 S. W. 533; *Ex parte Springfield*, 28 Tex. App. 27, 11 S. W. 677. This case should have been returnable before the District Court of Robertson County. Judge Scott had the authority to grant the writ, but it should have been made returnable before the district judge or District Court of Robertson County, and there tried.

The judgment refusing bail will be set aside, and the writ will be made returnable before the district judge or District Court of Robertson County, who will designate the time and place of hearing, and make such orders as to notice and witnesses as will secure a speedy hearing. It is accordingly ordered.

GRESHAM v. STATE.

43 Tex. Crim. Rep. 466—66 S. W. Rep. 845.

Decided February 19, 1902.

JUDGE: *Disqualified by reason of relationship to a party—Consent cannot confer jurisdiction—Public policy.*

1. Where under the Constitution and a statute a judge is disqualified by reason of relationship to a party, the judgment rendered is void.

2. The law in this regard is based on public policy. Consent cannot confer jurisdiction on a judge disqualified by law.

Court of Criminal Appeals of Texas.

Appeal from the County Court of Hood County; Hon. H. D. Payne, Special Judge.

Newt Gresham, convicted of libel, appeals. Reversed.

No brief on file for the appellant.

Robert A. John, Assistant Attorney General, for the State.

BROOKS, J. Appellant was charged by indictment with libel, upon trial was convicted, and his punishment assessed at a fine of \$100.

In the view we take of this record, it is only necessary to consider one question, to-wit, that raised by the first bill of exceptions, as follows: "That Hon. H. D. Payne was elected special judge because of the sickness of Hon. Phil Jackson, the duly elected and qualified judge of said County Court; and the above styled and numbered cause being called for trial by said special judge, H. D. Payne, and it being made known by said special judge that he was related to the defendant Newt Gresham, both by consanguinity and affinity; and it appearing that the relationship between said special judge and defendant is as follows: The grandfather of said special judge and the grandmother of the defendant were brother and sister, and that the said special judge married his (said special judge's) cousin, granddaughter of his (said special judge's) grandfather—defendant claimed that the relationship existing between defendant and said judge disqualified said judge from trying said case, and for that reason objected to his trying it," etc. The court appends the following explanation to the bill: "The court was under the impression that he and defendant were fourth cousins until the jury was impaneled, and he discovered that he and defendant were third cousins; that is, the court's mother and defendant were second cousins. Then the court retired the jury and explained the facts to defendant and counsel for defendant and the State, and asked that another person try the case. Defendant and his counsel said they would not agree to anything. Then the court proceeded to try the case."

Article 606, Code Cr. Proc., provides: "No judge or justice

of the peace shall sit in any case where he may be the party injured, or where he has been of counsel for the State or the accused, or where the accused or the party injured may be connected with him by consanguinity or affinity within the third degree." This provision is a copy of the Constitution, Art. 5, § 11. This clearly renders the judge trying this case disqualified from sitting in the same. Furthermore, the consent of parties cannot remove a judge's incapacity, nor restore his competency, against the express provisions of the law and the Constitution, which were designed not merely for the protection of the parties, but for the general interests and due administration of justice. *Abrams v. State*, 31 Tex. Cr. R. 449, 20 S. W. 987; *Chambers v. Hodges*, 23 Tex. 104; *Gains v. Barr*, 60 Tex. 676. The judge being disqualified under the law and Constitution renders absolutely null and void the judgment herein. This being true, we do not deem it necessary to pass upon any other question involved.

The judgment is accordingly reversed, and the cause remanded.

Reversed and remanded.

STATE v. DICKEY.

48 W. Va. 325—37 S. E. Rep. 695.

Decided December 1, 1900.

JURORS NOT JUDGES OF THE LAW—INSTRUCTIONS: *Manslaughter—Self-defense.*

1. Manslaughter and self-defense; instructions.
2. On a second criminal trial, the accused has no right to have read to the jury an extract from an opinion of this court on a former writ of error in the case commenting on the weight and effect of the evidence given on a former trial, though it be the same evidence on the second trial.
3. The jury in a criminal case is not the judge of the law, contrary to the instructions of the court, but must follow the instructions of the court upon the law.
4. Whether a homicide is voluntary manslaughter or homicide in self-defense is a question of fact for the jury upon the evidence. (Syllabus by the Court.)

Supreme Court of Appeals of West Virginia.

Error to Circuit Court, Braxton County; Hon. W. G. Bennett, Judge.

John Dickey, convicted of manslaughter, brings error. Affirmed.

Linn & Byrne, for the plaintiff in error.

Edgar P. Rucker, Attorney General, and *Hines & Kelley*, for the State.

BRANNON, J. Dickey was tried in the Circuit Court of Braxton County for the murder of Tanner, convicted of tary manslaughter, and sentenced therefor, but the judgment was reversed by this court. 46 W. Va. 319, 33 S. E. 231. Upon a second trial the jury again convicted Dickey of voluntary manslaughter, and the court sentenced him to the penitentiary, and he has sued out this writ of error.

Dickey complains that the court erred in giving instructions. Those instructions are as follows:

"No. 3. The court instructs the jury that where there is a quarrel between two persons, and both are in fault, and a combat as a result of that quarrel takes place, and death ensues, in order to reduce the offense to killing in self-defense two things must appear from the evidence and circumstances of the case—First, that before the mortal blow was given the prisoner declined further combat, and retreated as far as he could with safety; and, secondly, that he necessarily killed the deceased in order to save his own life and protect himself from great bodily harm.

"No. 4. The court instructs the jury that they are the sole judges of the evidence, and that they may believe, or refuse to believe, any witness, and that when passing upon the credibility of any witness they may rightly take into consideration his interest in the matter in controversy, and his demeanor upon the witness stand.

"No. 5. The court instructs the jury that a reasonable doubt is not a vague or uncertain doubt, and that what the jury believes from the evidence as men they should believe as jurors.

"No. 6. The court instructs the jury that a man is presumed to intend that which he does or which is the immediate or necessary consequence of his act.

"No. 7. The court instructs the jury that voluntary manslaughter is where the act causing death is committed in the heat of sudden passion caused by provocation; and they are further instructed that if they believe from the evidence that the defendant, in the heat of sudden passion, caused by provocation, killed James Tanner at the time and place alleged in the indictment, they should find the defendant guilty of voluntary manslaughter, unless they further believe from the evidence that the defendant believed, and had reason to believe, that the blow which resulted in Tanner's death was necessary to protect his own life, or protect himself from great bodily harm, and that the necessity of inflicting said blow was not brought about by the defendant's own conduct."

The court gave an instruction marked "a," as qualifying instruction No. 5, as follows: "(a) The court instructs the jury that, notwithstanding the instruction given at the instance of the State, that a juror is not at liberty to doubt as a juror and believe as a man, yet if, upon the evidence in this case, such a doubt is raised as would cause a juror to hesitate and to refrain from acting were it a grave business matter, then such doubt is a reasonable doubt, and such juror should give the defendant the benefit of that doubt."

I am unable to see any defects in these instructions.

Another assignment of error is that the court refused to allow counsel for Dickey, in his address to the jury, to read certain paragraphs from the opinion in this court in its former decision touching instructions Nos. 1 and 6, given on the former trial, the matter so sought to be read, commencing with the words, "It is next claimed that the court erred in giving, at the instance of the State, instruction No. 1," and closing with the words, "If not, it was error to assume the fact, and incorporate it in the instructions before the jury had an opportunity of passing on the question," which matter will be found in 46 W. Va. 321-323, 33 S. E. 232. As I understand the law of this State, a jury in a criminal case is the judge of both law and fact, but only in the sense that it may, even contrary to the instructions of the court upon the law, acquit; for, if it convicts contrary to the law, its verdict may be set aside by the court; and therefore it should receive the law as expounded by the court, even in a criminal case, and follow it. But I am not to be understood as saying that a prisoner has not the right

to have his counsel read sound law to the jury. Has he a right to have read to the jury any law his counsel may choose, though it be unsound law? I would say not. In some States, where the rule is that the jury is judge of law and fact, he has such right. He has no right to argue against instructions of the court. *Davenport v. Com.*, 1 Leigh, 588; *Dejarnette v. Com.*, 75 Va. 867. But the question whether the prisoner has the right to read any law, good or bad, is not involved in the case. Touching the subject, see 2 Enc. Pl. & Prac. 709; *Gregory v. Ohio River R. R. Co.*, 37 W. Va. 606, 16 S. E. 819; *Floyd v. Pollock*, 27 W. Va. 75; *Dejarnette v. Com.*, 75 Va. 867; *Brown v. Com.*, 86 Va. 466, 10 S. E. 745—the last case denying that the jury in a criminal case is the judge of the law; 1 Bish. Cr. Proc. § 984; *Doss' Case*, 1 Grat. 559; *Hurst's Case*, 11 W. Va. 77.

I have said that the case does not involve purely the question whether the accused had the right to have read law to the jury. The matter of the opinion of this court which the counsel proposed to read was not matter of law. It was a comment upon the evidence, its weight, and the interferences therefrom, to show the impropriety of instructions Nos. 1 and 6, then under consideration by the judge who delivered the opinion; and whatever that judge or the members of this court thought was the proper weight of the evidence, or what deductions should be made therefrom, could not influence the jury on the second trial in weighing the evidence, for the plain reason that the jury on the second trial was uncontrollably the judge of the evidence, its weight, its credit, and the proper inferences therefrom, uninfluenced wholly by any opinion on such evidence by this or the Circuit Court. The said opinion was dealing with that evidence in so far as it touched upon the instructions then before this court; but that comment on the evidence before the jury on the second trial was not admissible, because, if of any effect on the jury, it would deprive the parties of their absolute right, under the Constitution and law, to have the jury pass its own unbiased judgment upon the evidence. We all know that in this State the trial court must absolutely refrain from expressing or indicating any opinion upon the evidence, and it thence follows, for a stronger reason, that the opinion of this court on the evidence given on a former trial was inadmissible. 19 Am. & Eng. Enc. Law (1st ed.) 622. The opinion was not intended to give

the weight of the evidence for use on a future trial before a jury, but only to guide the court on a future trial as to the instructions, which the judge delivering that opinion was discussing. The opinion near its close repudiates the idea that in what was said as to evidence it should affect a future trial. Though counsel for the accused stated that he did not propose to use that opinion for the purpose of influencing the jury in weighing the evidence, yet, if it had any weight or effect with the jury, it could only have weight upon that evidence, since it was not a discussion of abstract principles of law, or the law of the case separated from that evidence. The jury could not discriminate. Very plainly, it tended to lead the jury to a certain conclusion upon the weight of the evidence, and would thus trench upon the province of the jury.

Another reason against reading that matter of the opinion is that it bore upon instructions condemned by this court, and not before the jury on the second trial, and therefore those instructions, and their discussion by this court were irrelevant to the matter before the jury.

Another consideration against treating this matter as evidence is that any legal principle which may be claimed as contained in the part of the opinion proposed to be read to the jury was inseparably combined with the discussion of the weight of the evidence, and for that reason should not have been presented in that form to the jury. If the accused desired such legal principles presented to the jury, his proper course was to embody them in an instruction; but he did not do so.

The question whether a jury is judge of the law in criminal cases was not necessary for the decision of the case, though germane to the case; but, feeling an interest in the question, I have carefully examined it, and I am of the opinion that although bench and bar have to some extent accepted it as true in the Virginias that the jury is the judge of law in criminal cases, with full right to differ from the court, to overrule the court, to disregard its instructions, and, under legitimate jury powers, to ignore the actual instructions of the court, the position is wholly untenable, not consistent with common law, and unsustained by the law in either of the Virginias. I might write at length upon the subject, but as able discussions thereon are accessible to bench and bar, I deem it unnecessary to do so. First, I will assert that the proposition is not sustained by the

decisions of either of the Virginias. In the general court of Virginia in *Doss' Case*, 1 Grat. 557, there is a passing expression—only that—in the opinion, saying: "The jury in a criminal cause are the judges of the law and the evidence." In *State v. Hurst*, 11 W. Va. 77, is another expression: "In a civil case, the jury must receive the law from the court, if it is given; in a criminal case, the jury are judges of the law as well as of the fact." I have not met with any other authorities for the prevalence of the wide-spread opinion of which I speak in the Virginias. The Virginia Court of Appeals has explicitly declared that "in criminal cases the jury are not the judges of the law." *Brown v. Com.* 86 Va. 466, 10 S. E. 745. In *State v. Burpee*, 65 Vt. 1, 25 Atl. 964, 36 Am. St. Rep. 775, 14 L. R. A. 145, this subject is discussed with great elaboration and learning, and the holding is, "Jurors are not paramount judges of the law in criminal cases;" and it is declared that the doctrine that the jury is the judge of the law is contrary to the great weight of authority at common law, tested by common law, in England and America. That case overruled several prior Vermont cases, and the opinion states that nearly all the older cases so holding have been overruled. The case so often referred to, to maintain this erroneous doctrine, because of its able discussion (*State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90), has been overruled by the said case of *State v. Burpee*. The case of *Com. v. McManus*, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761, 14 L. R. A. 89, holds the modern rule, overruling *Kane v. Com.*, 89 Pa. St. 522. See opinion of Judge Mitchell in that case, saying: "As already said, there is not a single respectable English authority for the doctrine in question, and against the foregoing solid phalanx of the best American judicial and professional opinion I have not been able to find a single well-considered case, except *State v. Croteau*, which was by a divided court." The annotator of the Lawyer's Reports Annotated, in note to *State v. Burpee* (Vt.) 14 L. R. A. 145 (s. c. 25 Atl. 964), calls the doctrine that juries in criminal cases are judges of the law a "ghost." Judge Cooley declares that it is against the great weight of authority. Cooley, Const. Lim. (6th ed.) 396, citing many cases. Also Whart. Cr. Pl. & Prac. § 805. 1 Thomp. Trials, §942, says the same. 19 Am. & Eng. Enc. Law (1st ed.) 613, says: "The prevailing doctrine, then, except in certain jurisdictions, is that, the province of the jury

being only to determine questions of fact, they have no power to decide any question of law whatever arising in the course of a trial, and far less questions of constitutional law." Justice Story very well said in *U. S. v. Battiste*, 2 Sumn. 243, Fed. Cas. No. 14,545: "My opinion is that the jury are no more the judges of the law in a capital or other criminal case, upon the plea of not guilty, than they are in civil cases tried upon the general issue. In each of these cases their verdict, when general is necessarily compounded of law and fact, and includes both. In each they must necessarily determine the law as well as the facts. In each they have the physical power to disregard the law as laid down to them by the court. But I deny that in any case, civil or criminal, they have the moral right to decide the law according to their own notions or pleasure. On the contrary, I hold it the most sacred constitutional right of every party accused of crime, that the jury should respond as to facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law as laid down by the court. This is the right of every citizen, and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views which different juries might take of it, but, in the case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury. Indeed, it would be almost impracticable to ascertain what the law, as settled by the jury, actually was. On the contrary, if the court should err in laying down the law to the jury, there is adequate remedy for the injured party by a motion for a new trial or writ of error. Every person accused as a criminal has a right to be tried according to the law of the land—the fixed law of the land—and not by the law as a jury may understand it, or choose, from wantonness or ignorance or accidental mistake, to interpret it. If I thought that the jury were the proper judges of the law in criminal cases, I should hold it my duty to abstain from the responsibility of stating the law upon any such trial." In *U. S. v. Greathouse*, 4 Sawy. 464, Fed. Cas. No. 15,254, Justice Field said: "There prevails a very general, but erroneous, opinion that in all criminal cases the jury are the judges as well of the law as of the facts; that is,

that they have the right to disregard the law as laid down by the court, and to follow their own notions on the subject. Such is not the right of the jury. They have the power, it is true, to disregard the instructions of the court, and in case of acquittal their decision will be final, for new trials are not granted in criminal cases where a verdict is passed in favor of the defendant, but they have no moral right to adopt their own views of the law. It is their duty to take the law from the court and apply it to the facts of the case. It is the province of the court, and of the court alone, to determine all questions of law arising in the progress of the trial; and it is the province of the jury to pass upon the evidence, and determine all contested questions of fact." A strong statement to the same effect will be found in *Hamilton v. People*, 29 Mich. 173.

I understand Mr. Bishop to hold the same view. 1 Bish. Cr. Proc. §983. In New York some early decisions maintained this right of the jury to pass on the law; but in *Duffy v. People*, 26 N. Y. 588, this doctrine was repudiated by the holding in 1863: "The jury in criminal cases are bound by the instructions of the court as to the law to the same extent as in civil cases." In *Carpenter v. People*, 8 Barb. 608, it is said: "The idea that in criminal cases the jury are the judges of the law as well as of the facts is erroneous, not being founded upon principle or supported by authority." Proffatt on Jury Trials, commencing with section 373, discusses the subject at length, and shows that at common law and in the great majority of the American States the doctrine that the jury has the right to judge of the law, in disregard of the court's holding, is not sound. I might greatly multiply authorities to show this. Even in States where there is a provision, by statute or Constitution, that the jury shall judge of the law and facts in criminal cases, it is held that such provision is only declaratory of pre-existing law, and that the jury must follow the law as expounded by the court. In Georgia it was formerly held that the jury should judge the law, but in *Brown v. State*, 40 Ga. 689, notwithstanding a statute provided that "the jury shall be judges of the law and the fact," the jury must follow the instructions of the court on the law. Such is the holding there. *Edwards v. State*, 53 Ga. 428; *Jackson v. Same*, 91 Ga. 271, 18 S. E. 298. In Massachusetts a statute provides that in criminal trials the jury, after receiving instructions from the court, shall "decide at

their discretion, by a general verdict, both the fact and the law involved in the issue, or return a special verdict, at their election." It has been held that under that statute there is no power—no rightful power—in the jury to determine the law against the instructions of the court. *Com. v. Anthes*, 5 Gray, 185, 303; *Com. v. Rock*, 10 Gray 4. The Maryland Constitution says that "in the trial of all criminal causes the juries shall be the judges of the law as well as of the facts," and it was held that the clause was merely declaratory of what already was the law, and did not alter the previous power of the courts and juries in criminal cases, and that counsel might be prevented from arguing as to the constitutionality of a law to the jury. *Franklin v. State*, 12 Md. 236.

I have above asserted that in Virginia there never was law adequate to sustain the proposition of the right of the jury to decide the law. In *Com. v. Garth*, 3 Leigh, 761, it was regarded as an open question, as manifested by the *quære* in the case. The eminent Judge Lee must have regarded it as unsettled, because in *Delaplane v. Crenshaw*, 15 Grat. 457 (Syl., point 12), he said: "In a civil suit (whatever may be the law in a criminal case), after the judge has given an instruction, the counsel should not be allowed to discuss the same matter which the court has already decided." But I have shown above that the Virginia courts decided that in criminal cases counsel should not argue contrary to the instructions of the court, and those decisions make it clear that the jury could not judge of the law in Virginia contrary to the ruling of the court; for, if so, how could the court prohibit a counsel from arguing against the instructions? It is the universal practice in Virginia for counsel to argue the law before the jury, using decisions and text-books in so doing, and this practice has been so long established that it would be a great innovation to deny its continuance. Notwithstanding, the sound law is that the jury is not rightfully the judge of the law, contrary to the ruling of the court, in either of the Virginias; and therefore, strictly speaking, counsel might be prohibited from arguing the law, under the general rule that it is only where the jury is the judge of the law that counsel may argue the law; still the practice in those States, firmly established, is to permit counsel to argue law from books before the jury, as is also the practice in Massachusetts and other States where the right of a jury to decide upon the law is denied. *Com. v. Porter*, 10 Mete. (Mass.) 263.

Generally, the practice in this State is for counsel to argue the case in full before the jury, on law and fact, and afterwards for the court to instruct as to law. If, however, instructions are given prior to the argument, counsel for prisoner cannot argue against the instructions—cannot read authorities against them; and, no matter when instructions are given, it is the obligatory duty of the jury to follow them. Of course, if no instructions are given, counsel may, under our practice, argue the law and the facts, with the right in the court to correct any misstatement of the law if the justice of the case should require; for we must remember that the State has rights as well as the accused—the right to have verdicts based on sound law. Whart. Cr. Pl. & Prac. § 578. The rights of the accused are not alone to be considered. There would be an outburst of protest if a prosecuting attorney were to argue unsound law against the instructions of the court; but, if the jury is the judge of the law, why should not this be tolerated? There are several reasons against the claim that the jury is finally, and regardless of the instructions of the court, the judge of the law: (1) It would violate that basic maxim of centuries' duration, consecrated by time and uniform usage, essential to the defense of life, liberty, and property, "*Ad quæstionem facti non respondent iudices; ad quæstionem juris non respondent juratores*"—to a question of fact judges do not respond; to a question of law jurors do not respond. (2) It is inconsistent with the Virginia holding that counsel shall not argue against the instructions of the court. Why not, if the jury is rightfully to judge of the law? (3) It is logically inconsistent with the rule everywhere prevalent that, if a jury convict contrary to law, the courts will set aside the verdict. How can they do so, if the juries are the judges of the law? If the jury acquit in violation of law, the public has no redress; but this is not because the jury is rightfully judge of the law, but because of the constitutional provision that no man shall be twice put in jeopardy for the same act. (4) It would be inconsistent with the rule everywhere prevailing that a jury cannot, in either a civil or criminal case, take any law books into the jury room. 19 Am. & Eng. Enc. Law (1st ed.) 615. But if the jury is to judge of the law, why not let the jury have a library of law books? (5) There would be no certainty or stability in the law, as one jury would decide one way, another jury another, and generally there

would be no redress for error. (6) Intelligent as jurors may be on general subjects, they are incompetent, from want of learning and training in the line of law, to assume the great responsibility of adjudging the law. (7) If the jury is to judge the law, why not also pass on the admissibility of evidence, it being with the jury to say whether certain evidence, under the law, shows a crime or not or a defense or not? (8) The court in all other cases passes on the law, as in demurrers to pleadings and evidence, admission of pleadings, admission of evidence, special verdicts, arrest of judgment, and the like, and why make an exception in this instance, and transfer this same duty—that of passing on the law—to the jury? The whole doctrine is unreasonable and inconsistent with the analogies, principles, and very framework of the whole judicial system.

As to the objection that counsel for the State made certain remarks in argument to the jury. No objection, protest, or exception was made against those remarks when they were made, so as to call the attention of the court to them, and have its corrective action thereon. The matter was first mentioned on motion for a new trial, when the court could not correct them, if objectionable. But I do not think those remarks could at all affect the trial, if timely objection had been made thereto. *State v. Shawn*, 40 W. Va. 1, 20 S. E. 873.

Next, as to the refusal of the court to set aside the verdict as not warranted by the evidence. The evidence is of large volume, given by many witnesses. As to the killing, that was not denied by the accused, the sole question being whether the killing was voluntary manslaughter, or in self-defense—a question purely of fact, dependent absolutely upon the credibility of the witnesses, and the weight of their evidence; purely a jury question. The evidence was *pro* and *con* upon this crucial question whether the act was voluntary manslaughter or homicide in self-defense. There could be no case suggested presenting a matter more proper for the decision of a jury. This court has again and again said that in such cases it cannot, under the very Constitution of the State, invade the province and prerogative of a jury, and overrule judge and jury. *Young v. Railroad Co.*, 44 W. Va. 218, 28 S. E. 932. Hence we are led to an affirmance of the judgment.

Affirmed.

STATE V. RICHARDSON.

72 Vt. 49—47 Atl. Rep. 103

Decided November 20, 1899.

MARRIAGE AND DIVORCE: *Prohibitory clause in a divorce statute construed.*

The Vermont statute which declares that a libelee in a decree of divorce shall not remarry within three years, does not apply to marriages solemnized in other States.

Supreme Court of Vermont.

Exceptions from Windsor County Court; Start, Judge.

Charles F. Richardson was informed against for a supposed breach of a divorce statute. Demurrer to the information overruled and the defendant excepts. Case passed to the Supreme Court before judgment. Action of the lower court reversed. Demurrer sustained and the respondent discharged.

The information which was filed on June 4, 1899, charged that the respondent was married to Alice Richardson at Albany, Vt., in July, 1886; that at the May term, 1898, of the Windsor County Court, a divorce was granted to the said Alice Richardson against the respondent; that the said Alice is still living; that on March 16, 1899, within three years of said divorce, the respondent was, in the State of New Hampshire joined in marriage to one Hattie M. Royce, of Norwich, Vt.; that immediately after said marriage, and on the same day thereof, the respondent returned with the said Hattie to the State of Vermont and from that time to the filing of the information he has lived with the said Hattie at Hartford, in Windsor County, Vermont as his wife under the said marriage relation so contracted with her in the State of New Hampshire, etc.

Argued before TAFT, C. J., and ROWELL, TYLER, MUNSON, THOMPSON, and WATSON, JJ.

W. W. Slickney and J. G. Sargent, for the State.

James G. Harvey, for the respondent.

TAFT, C. J. V. S. c. 132, regulates the subject of "Marriage and Divorce." Section 2703 of that chapter provides that,

when a marriage is dissolved pursuant to that chapter, the libelee is forbidden to marry a person other than the libelant for three years from the time such divorce is granted, unless the libelant dies. Section 2704 enacts that a person who violates the preceding section, or lives in this State under a marriage relation forbidden thereby, shall be imprisoned, etc. In *State v. Shattuck*, 69 Vt. 403, 38 Atl. 81, 40 L. R. A. 428, it was held that, when a libelee in such a case, residing in this State, went into the State of New Hampshire, was there married, and returned to this State, her marriage was lawful here. The respondent is complained of under section 2704 for living under a marriage relation forbidden by section 2703. The marriage was solemnized in New Hampshire; and if the respondent and Hattie M. Royce, the person to whom he was married in that State, are lawfully man and wife in this jurisdiction—as they are under the authority of *State v. Shattuck*, *supra*—it follows that they cannot be punished for living together in that relation in this State. *State v. Shattuck*, *supra*, is decisive of this case.

Judgment overruling the demurrer reversed. Demurrer sustained. Information adjudged insufficient, and quashed, and the respondent discharged.

PAULSON v. STATE.

118 Wis. 89—94 N. E. Rep. 771.

Decided May 8, 1903.

MURDER—CORPUS DELICTI EVIDENCE—MISCONDUCT OF COUNSEL—PREJUDICIAL TESTIMONY: *Proof as to cause of death incriminating circumstances—Identity of charred remains—Improper and prejudicial testimony as to other and distinct criminal acts committed by the accused—What is prejudicial error—Non-waiver of error—Erroneous exclusion of explanatory testimony—Unwarranted and prejudicial remarks by the District Attorney in his opening statement—Photographs in evidence—Error in not striking out opinionative, uncertain and unreliable testimony—Conduct and declarations of accused, etc., during flight—Failure to request limiting instruction—Allbi met by expert testimony.*

1. The evidence, as it appears in the statement of the case and in the
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opinion, held sufficient to justify the jury in finding, and identity of the deceased, that she came to her death by criminal means and the guilt of the accused.

2. Proof of defendant's previous history, his being tried for another crime, etc., was improper and prejudicial. "From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the very offense charged, and that neither general bad character, nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him."
3. It was gross error to permit the prosecution to prove that three years before the alleged crime the accused had been convicted of larceny, or in permitting any other derogatory facts to be proved against him.
4. It was clearly erroneous to allow parol evidence as proof of previous court proceedings.
5. To warrant a court of review in deeming an error harmless, it should appear beyond doubt that the error complained of could not have prejudiced the rights of the party.
6. It was reversible error for the District Attorney to make a statement of fact to the jury in his opening statement, which was afterwards in no wise supported by proof.
7. It was not error to give in evidence, photographs of the burnt premises, where the deceased met her death.
8. The ruling of the court below on a motion to strike out certain testimony were not to be disturbed where the court below had a better opportunity to pass upon it correctly than the reviewing court.
9. "Conduct of a suspected person after the crime is a legitimate subject for consideration, as bearing upon the probability of his guilt; and it is not easy, if at all possible, for courts to draw any line segregating those acts which to some minds may seem significant of guilt from those which are irrelevant because justifying no such inference."
10. Failure to instruct the jury, that impeaching testimony should not be considered as substantive evidence of guilt, is not ground for reversal, where the accused did not ask an instruction thereon.
11. Where the accused testified as to riding on an engine of a particular description, it was proper to show by a brakeman, familiar with that line of railroad, that such engines are not used thereon.
12. While it is to be greatly regretted that the labor of the protractive trial should be lost, no such consideration can bear any

comparison in importance to the possibility of an innocent man being convicted.

Supreme Court of Wisconsin.

Error to Circuit Court, Buffalo County; Hon. E. W. Helms, Judge.

Erick L. Paulson, convicted of murder in the first degree, brings error. Reversed.

STATEMENT OF CASE.

Writ of error to conviction and sentence of the plaintiff in error, hereinafter called the "defendant," of murder in the first degree, for the murder of one Mary Seldon at the town of Pepin on June 16, 1898. The general course of events, as claimed by the prosecution, was substantially as follows:

On the date named, Thomas Seldon, a farmer, residing about two miles from Pepin, left home to attend a veterans' reunion at Pepin, together with all his family except his sixteen-year-old daughter Mary, who was left in charge of the house, at from 9:30 to 10:30 in the forenoon. He left approximately \$400 in a locked secretary in said house, containing, amongst other things, thirteen \$20 gold pieces and one \$10 gold piece, the remainder being mainly in paper, with some silver. The daughter, Mary, was a quiet, home-staying girl of cheerful disposition, and exhibiting nothing abnormal in her disposition. Somewhere about 1 o'clock the house was discovered to be on fire by a passing farmer, who entered the premises, saw no one, made some entirely futile attempts at checking the fire, and then devoted himself to setting at liberty certain animals, and saving a buggy, and perhaps other property, from the sheds; he not being able to enter the house by reason of its being locked and by reason of the extent of the conflagration. An hour or two later, when the destruction was practically complete, Mr. Seldon, and about the same time some others, arrived on the ground, and about this time was discovered the trunk of a human body lying in the cellar of the one-story kitchen, upon what appeared to be the coals of a prepared pile of firewood, entirely distinct from the debris of the burned building, and of magnitude about six by eight feet square and some eighteen inches deep. A careful search in the ashes under the place where the secretary had stood resulted in the finding of no coins except two nickel pieces and a two-shilling pocket piece;

also the lock of the secretary. There is no evidence of any one's being known to enter the premises after Seldon's departure until the discovery of the fire, except a son, who testifies that he came from another farm, put up his horses, got something to eat, and then himself went to Pepin to attend the reunion, perhaps an hour later than the others. The defendant resided with his father some five or six miles in another direction from the village of Pepin, and was not shown to have any recent knowledge of the Seldon premises. It was proved that he declared, a day or two before the 16th, that he was without money. It appeared that certainly on the morning of the 17th he was in St. Paul and Minneapolis, and made certain purchases, and expended money to the amount of \$20 or \$25. Upon inquiry he claimed to have started for St. Paul during the night of the 15th, and, by stealing rides, to have arrived in St. Paul about noon of the 16th. Evidence was offered, in contradiction of this, that he was seen at Stockholm, on the Wisconsin side of Lake Pepin, and again in Lake City, on the Minnesota side, in the evening of June 16th, and that a boat was taken from the shore at Stockholm the evening of the 16th, and found on the shore at Lake City the following day. The identification of the defendant as the person so seen was a subject of dispute. He was arrested on June 20th, and in the August following made his escape from the county jail, after being informed that there was a threat of lynching. After some days of hiding, during which he visited his father's house, he fled to North Dakota, where he adopted an assumed name, and, after some farm work, spent the winter in a shanty in a remote region, hunting and trapping. Evidence was offered of the expenditure by him of considerable sums of money, including some six or seven \$20 gold pieces. Other facts material to specific errors appear in the course of the opinion.

S. G. Gilinan, for the plaintiff in error.

L. M. Sturdevant, Attorney General, and *Walter D. Corrigan*, Second Assistant Attorney General, for the State.

OPINION.

DODGE, J. (after stating the facts). 1. The first branch of the contention of plaintiff in error is that the evidence was not sufficient to establish beyond a reasonable doubt either of the

three elements of the alleged crime—the *corpus delicti*, the identity of the body, nor defendant's commission of the crime. It is neither necessary nor seemly for us to express the conclusion which, as individuals, we might have reached from a consideration of all this evidence. It is immaterial whether any member of the court might or might not have been convinced beyond a reasonable doubt of all or any of these elements of the crime charged. The question is whether the jury, as reasonable men, might have been so convinced; and in approaching that question it must be recognized that they had the right to believe one witness, and equally to disbelieve another completely, or to accept as true and correct part of the testimony of any witness and to reject other parts; to weigh the interest and *animus* of each, and in so doing to be affected and guided by the appearance of each witness and his manner of testifying. In the light of these rules and considerations, we proceed to examine the evidence.

We have before us the facts that, a few hours before, a sixteen-year-old girl was left in this farmhouse with every probability, from her character and habits, that she would be found there alive on the return of her parents later in the day; that a body was found after the destruction of that house by fire, under circumstances which might warrant the inference that, at the expense of much exertion, a considerable quantity of cordwood had been carried into the cellar, and the body placed upon it after life was extinct. Supplementing these was the circumstance, which evidence tended in some measure to prove, that a robbery had occurred in the house. By way of identification it was testified that the bones which remained, consisting of the head, spinal column, and the pelvic bones, were of such size as to be consistent with the description of this sixteen-year-old girl; and one witness, who knew her intimately, testified to similarity in appearance of the teeth to those of Mary Seldon, which were described as peculiar. True, in many of these respects doubt might well arise as to the ability of a witness to testify with any certainty to such facts, but those doubts were within the province of the jury, and bore not upon the competency of the evidence, but upon its weight. Hence, there was evidence of the existence of a dead body, of its identity as that of Mary Seldon, who was alive a few hours before, and there were facts and circumstances from which might well

have been drawn inference of sudden and unusual death, with other facts and circumstances warranting inference against suicide or accident. Under the rules of a law with reference to the character and *quantum* of proof necessary to establish the *corpus delicti* and identity, as declared in *Buel v. State*, 104 Wis. 132, 80 N. W. 78, we are forced to the conviction that the field was open to the jury, without outrage upon reason, to be satisfied with the necessary certainty that the body found was that of Mary Seldon, and that her death had occurred by criminal means.

The more salient evidence bearing upon the connection of the defendant with such crime has already been related in the statement of facts. The presence in this house of money to serve as a motive, although there is little or no evidence that the defendant knew of it; the almost complete desertion of this and neighboring farmhouses by reason of the gathering in Pepin; the disappearance of the money (all of which the jury might within reason have believed from the evidence)—present opportunity and motive for one living in the neighborhood. The fact, if the jury concluded it so to be, that defendant a day or two before had no money, and on the following day had money, is significant. The further fact, in this immediate connection, that after an incarceration of a few months, and his escape from jail to the Dakotas, he was in possession of money in considerable amounts, including gold coins such as disappeared from this house, which, it must be confessed, are not the customary form of daily exchange, is also a circumstance entitled to weight. The defendant, at great length, detailed the course of his transactions and the extent of the work done and moneys earned during that period, and that evidence was subject to analysis and credit or discredit, according to probabilities, by the jury, and, in our opinion, might, at their hands, have received such construction and such belief as to constitute to their minds a false story, built up for the purpose of accounting for the possession of this amount of money and of these gold pieces, and therefore in itself an evidence of guilt. During this same period the conduct of the accused was covered in minute detail by the production of witnesses at almost every stage of the events, indicating an industry and intelligence of research on the part of the prosecution most commendable. It took a wide range, covering the use of assumed names, of various state-

ments made by accused as to his prior history, his place of residence, his possession of money and the source thereof, and of peculiar precautions in the giving of addresses for the receipt of mail and the like; many of which might have been deemed by the jury significant of a consciousness of guilt and desire to elude pursuit. Of course, those triors of fact might have deemed the fact established that defendant was in terror of lynching, and that these precautions were referable thereto, rather than to any sense of guilt; but equally they might not have so believed, and the weight of such circumstances as proof of defendant's guilt of the crime charged was, therefore, in their hands; and with their conclusion, confirmed by the opinion of the trial judge, indicated by his overruling of motions for a new trial and in arrest of judgment, it is not the province of an appellate court to interfere. Again, the very attempt to establish an *alibi* on June 16th, if the story were a fabrication, as the jury might have believed, might have been deemed significant of guilt, especially in connection with the furtive method of the actual trip on the evening of June 16th, if the jury believed in the identification of defendant at Stockholm and Lake City. Without further discussion of the evidence, but after carefully considering all of it, we find ourselves unable to say that the jury might not, as reasonable men, have reached conclusions adverse to defendant's innocence upon each and all of the crime charged, beyond reasonable doubt; and we should not feel bound or justified in denying final effect to their decision on that question of fact, if satisfied that it has been reached without the influence of improper evidence and under correct rules of law.

2. Several assignments of error are predicated upon the introducing in evidence, over objection and exception, of certain items of defendant's history in no wise connected with the crime charged, but tending to vilify or degrade him in the minds of the jury; especially that some three years before he had been guilty of stealing a quantity of rye from a farmer in Minnesota; that at first, on preliminary examination, he pleaded guilty, but later, when arraigned for trial, he changed front, and denied guilt; that after commitment by the justice he was confined in jail; that he was tried upon an indictment the contents of which were testified to orally; that four witnesses, whose names were given, testified against him; that a verdict of guilty was

returned against him, and that the court sentenced him to the State Reformatory. All the foregoing was given verbally in making the State's original case, against objection for immateriality and because not the best evidence. In addition to this, the State introduced the certified record of a conviction for larceny of certain rye in 1895, and of sentence. Another—perhaps trifling—item of evidence was to the effect that five years before the offense charged defendant had been a medicine peddler.

From the time when advancing civilization began to recognize that the purpose and end of a criminal trial is as much to discharge the innocent accused as to punish the guilty, it has been held that evidence against him should be confined to the very offense charged, and that neither general bad character nor commission of other specific disconnected acts, whether criminal or merely meretricious, could be proved against him. This was predicated on the fundamental principle of justice that the bad man no more than the good ought to be convicted of a crime not committed by him. An exception is indulged where other crimes are so connected with the one charged that their commission directly tends to prove some element of the latter—usually guilty knowledge, or some specific intent. We mention this exception merely for accuracy, to qualify the generality of the foregoing statement. It obviously can have no application to such remote and disconnected events as those here presented. The cases in which overzealous prosecutors have trespassed upon this rule, so that appellate courts have had occasion to give it reiteration, are almost without number. Many are collected in a note in Whart. Crim. Ev. (9th ed.) § 30. A few others may be cited: *Regina v. Oddy*, 5 Cox Cr. C. 210; *Boyd v. United States*, 142 U. S. 450, 458, 12 Sup. Ct. 292, 35 L. Ed. 1077; *Shaffner v. Commonwealth*, 72 Pa. St. 60, 13 Am. Rep. 649; *Commonwealth v. Jackson*, 132 Mass. 16; *Sullivan v. O'Leary*, 146 Mass. 322, 15 N. E. 775; *Lightfoot v. People*, 16 Mich. 507; *Albricht v. State*, 6 Wis. 74; *Schaser v. State*, 36 Wis. 429; *State v. Miller*, 47 Wis. 530, 3 N. W. 31; *Ingalls v. State*, 48 Wis. 647, 654, 4 N. W. 785; *Fossdahl v. State*, 89 Wis. 482, 62 N. W. 185. The foregoing cases are referred to not so much to establish the rule that evidence of such remote acts is irrelevant, and therefore inadmissible, for that must be obvious at a glance. That one stole rye from some one in

Minnesota in 1895 has no tendency to prove that he committed this murder in Wisconsin in 1898. They are cited more especially to show how uniformly courts have held that one cannot be deemed to have had fairly tried before a jury the question of his guilt of the offense charged when their minds have been prejudiced by proof of bad character of accused or former misconduct, and thus diverted and perverted from a deliberate and impartial consideration of the question whether the real evidentiary facts fasten guilt upon him beyond reasonable doubt. In a doubtful case even the trained judicial mind can hardly exclude the fact of previous bad character or criminal tendency, and prevent its having effect to swerve such mind toward accepting conclusion of guilt. Much less can it be expected that jurors can escape such effect. In a case of this sort, where it is believed that so horrible a crime has been committed and where naturally and properly there is great anxiety that such outrage do not go without retribution upon the perpetrator, as to whose identity the field of speculation is wide, the tendency to fasten suspicion upon some member of the community whose record is bad is very strong, and fraught with great danger to the unfortunate individual, however, innocent. In such a case a most imperative duty rests upon the Court to take every precaution that such facts as we are now considering do not reach the knowledge of the jury. While it is awful that such a tragedy as this may happen in a civilized community, and the guilty man escape punishment, it is inexpressibly worse that the law itself should add thereto the still more terrible crime of imprisoning for life an innocent person; thus subjecting the community to two crimes, instead of one, and leaving the criminal still unpunished. Whether such result has been accomplished by the judgment here we cannot know with certainty, but it is at least possible, if the minds of the jury have been subjected to the perverting influence of irrelevant facts and circumstances, which do not logically nor legally tend to establish guilt, but which may naturally turn suspicion in defendant's direction, and create a prejudice against him, depriving him of that impartiality and anxious regard for his safety, if innocent, which the jury owed him were he the vilest of the vile.

The Attorney General seeks, not so much to justify, but rather to palliate, the admission of the testimony as to the

criminal proceedings on the ground that the Court ruled it admissible as tending to identify the transaction with that claimed to have been mentioned by the defendant to the District Attorney in accounting for his possession of the money he spent in Minneapolis and St. Paul. It could not be so justified, even if it had such tendency. The fact of previous guilt or conviction was not a proper one to be proved, and defendant's own admission thereof, standing alone, would not have been admissible. It could come in only because it was a part of a statement relating to other and relevant facts. *Lightfoot v. People*, 16 Mich. 507; *Coleman v. People*, 55 N. Y. 81, 89. It could not open the door for affirmative and original proof of the forbidden fact. Defendant had a right to go to the jury upon contention of either falsity or inaccuracy of the testimony that he had made such statements; which, by the way, hardly admitted conviction, even as narrated by some of the witnesses to the conversation. Further, however, the extended and graphic narrative of the proceedings in the Minnesota court was not at all necessary to the attempted identification. The only word from the witness who gave it which could have had any relevancy to the case on trial was the statement that only on one occasion was defendant present in the Minnesota court, thus giving significance to the testimony of Johnson, the then prosecuting witness, that defendant declared to him that all money received for the rye in question had been spent. It should be noted, however, that no such excuse was even offered for admitting in evidence the certified record of the conviction. That was expressly received by the Court to prove the fact that defendant had been convicted of a crime.

We are thus brought irresistably to the conclusion that palpable and grave error was committed in permitting any of these derogatory facts to be proved against the accused in any way. In addition to this fundamental error, it was also clearly erroneous to allow parol proof of the various court proceedings, of which the best and only proper evidence was the record. *Kirschner v. State*, 9 Wis. 140, 145; *Ingalls v. State*, 48 Wis. 647, 655, 4 N. W. 785. Even for purposes of impeachment, parol proof of a prior conviction can be made only by virtue of statute (section 4073, Rev. St. 1898), and then only by cross-examination. To that extent only has the present statute modified the rule declared in the two cases last cited.

That the errors committed in the admission of these various items of evidence were well calculated to prejudice the accused cannot be seriously doubted. His right was to have the jury weigh all the suspicious circumstances upon the presumption that he was a man of ordinarily good character and reputation; to dwell upon the consideration that circumstances may be accumulated against any person, and the conclusion of guilt be still in reasonable doubt, for the reason alone that ordinary persons seldom or never commit such atrocities as this. Hardly any consideration could more probably hasten the jury to ignore that doubt than that the accused was not one of ordinary character, but a convicted criminal, familiar with the inside of jails and their debauching effects. When distinct error is committed, courts cannot lightly assume that no prejudice has resulted. Prejudice is the ordinary result of breach of a rule of law, else the rule itself could have no right to exist. To warrant Appellate Courts in deeming an error innocuous, it is said: "It should appear beyond a doubt that the error complained of did not and could not have prejudiced the rights of the party duly objecting." *B. & A. Railway v. O'Reilly*, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006. Such considerations as just stated constrain us to disagreement with the contention that the error in proving the various derogatory or degrading facts in defendant's history must be deemed nonprejudicial, because afterward the defendant took the stand as a witness, and thereby opened the door to proof of a prior conviction by way of impeachment, so that at worst this objectionable evidence was merely received out of order. To this it might well be urged that the order in which facts are brought to the minds of the jury may substantially vary the effect. It is, however, sufficient answer to this argument that the evidence received over objection far exceeded anything which would have been admissible by way of impeachment, even after defendant had testified. Proof of specific acts of crime or misconduct is generally not admissible for impeachment. *Roscoe Cr. Ev.* (11th ed.) pp. 95, 142; *Rex v. Layer*, 16 How. St. Tr. 285; *Commonwealth v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325; *Carlhaus v. State*, 78 Wis. 560, 47 N. W. 629; *Emery v. State*, 101 Wis. 627, 650, 78 N. W. 145. It is only by virtue of statute that the fact of previous conviction is an exception to that rule. (See note to section 4073, Rev. St. 1898; *Roscoe*

Cr. Ev. p. 95). That statute permits no other exception than proof of the fact of conviction, and permits that proof only by cross-examination of the witness himself, or by the record. The trial court permitted proof of various specific facts tending to degrade the defendant, other than the mere fact of conviction, and permitted that proof to be made by parol evidence from witnesses other than accused. This, as already stated, could not have been done by way of impeachment; hence the error was in no wise cured or waived by the fact that defendant took the stand, and thereby subjected himself to proper impeaching evidence.

3. Error is also assigned because defendant was precluded from proving the balance of a conversation, part of which the State had given. The Court apparently applied rather strictly a rule limiting cross-examination to the exact subject of direct examination. The right of a party to call witnesses to testify further as to a conversation of which part has been proved by his adversary is not so limited. In general, such party has a right to give the whole of such conversation, at least so far as it has relation to the subject-matter of the action, and is not confined to that particular part thereof given by his adversary. *Roscoe*, Crim. Ev. (11th ed.) p. 51; *Mack v. State*, 48 Wis. 271, 279; 4 N. W. 449; *Plano Co. v. Frawley*, 68 Wis. 577, 585, 32 N. W. 768; *Fertig v. State*, 100 Wis. 301, 307, 75 N. W. 960; *Frank v. State*, 27 Ala. 37; *Dodson v. State*, 86 Ala. 60, 5 South, 485. The portion of the conversation drawn out by the State, among other things, was made a basis for argument that the money which defendant had in Dakota in the fall of 1898 was the same stolen at the Seldon house, because he visited his father's house before going west, and might thus have repossessed himself of that money. If, in the same conversation, defendant negatived such inference by explaining where and how he obtained money—as we understand he did—such statements related to the same subject-matter, and served to explain and qualify the portion made use of by the State. We are persuaded that the exclusion of proof of other parts of this conversation was error which might well have prejudiced defendant by withholding from the jury the fact that his whole statement, taken together, rebutted, instead of supported, the inference urged by the prosecution.

4. Error is also assigned upon the claim that the District

Attorney, in his opening to the jury, before the taking of any evidence, stated as a fact that the accused, on the day before the event, was seen so close to the house, and under such circumstances, as to arouse suspicion of a bad purpose—not upon the traveled highway, but upon the road east of the Seldon house, in the edge of the woods, in company with unknown persons, who immediately disappeared, and went into the woods—of which facts not the slightest shred of evidence appeared throughout the case. Such a statement was undoubtedly calculated to greatly prejudice the accused. It served to keep him in the minds of the jury, marked as a legitimate person for suspicion, while the various facts and circumstances were being brought out in evidence, which otherwise would have had no special application to him. It also supplied to their minds that which was especially lacking in the evidence, namely, the prior contact of the accused with the immediate vicinity, at any rate within many years. If the prosecuting attorney made such a statement without a well-founded belief that the proof was in his hands, he could not be too strongly reprehended, and the prejudice would be so obvious as to make very cogent ground for the Circuit Court to deny or set aside conviction. We are loath to believe that he could have been guilty of such a breach of professional and official ethics; and, while it is somewhat difficult, in view of the absolute absence from the record of any offer to make such proof, to conceive circumstances which should justify it, we must, in justice to the high character of this officer, indulge ourselves in the belief that at the time of making the statement he thought he had witnesses to testify to such fact. We shall content ourselves with pointing out the impropriety of the statement in the absence of such well-founded belief, without attempting to decide whether the statement of itself must constitute reversible error, in the absence of any request to the trial court to take action to rebuke the same, and warn the jury against allowing it any effect.

5. Error is alleged upon the introduction of a number of photographs showing the ruins and the surrounding premises. Testimony showed them to be correct representations of the scene attempted to be portrayed. We think they fall within the rule of admissibility as outlined in *Seeleck v. Jonesville*.

104 Wis. 574, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892, and that the error is not well assigned.

Neither can we persuade ourselves that there is reversible error in the admission in evidence of a partially burned block of wood taken from the pile of charcoal on which the body was found.

Again, the refusal to strike out the testimony of a witness—Gludt—to the effect that he was of the opinion that accused was the same person seen by him in Lake City, Minn., the evening of June 16th, which is assigned as error, we think should be sustained. The language of the witness as to reaching a belief of the identity of the two from information derived from others might well have been construed as applying to a conclusion reached by him before seeing the defendant, and is not inconsistent with the view that the testimony to his identity was based upon memory of the person seen at Lake City and observation of the defendant in court. Of course, the trial court had a better opportunity to judge on that question, and we cannot disturb his resolution of the uncertainty arising from the testimony.

A large amount of evidence, not necessary to mention in detail, was given with reference to the conduct of defendant during the period of his flight from arrest, covering his conduct, numerous declarations shown not to be true, the use of assumed names, his places of residence, the use of money, carrying of firearms, and the like. This has been examined carefully, without impressing upon us that it presents anything of prejudicial error. Conduct of a suspected person after the crime is a legitimate subject for consideration, as bearing upon the probability of his guilt; and it is not easy, if at all possible, for courts to draw any line segregating those acts which to some minds may seem significant of guilt from those which are irrelevant because justifying no such inference. We are unable to say that any of those assigned as error necessarily fall within the latter category.

Complaint is made that the State was allowed to introduce in rebuttal proof of a conversation in which the defendant was said to have stated that he knew a "place where he could get some money, and, if there was anybody in the house, it would be easy to hit him on the head, and nobody would ever find out." Defendant had been asked on cross-examina-

tion if he did make such a statement to the witness at the time alleged, and denied it. The evidence is claimed to have been used not merely for purposes of impeachment, but as substantive proof of knowledge of opportunity, and hence of motive. Of course, if it were admissible at all for the latter purpose, it should have been offered by the State in its original case. Offered as it was, its admission was justified merely by the fact that defendant had, on cross-examination, denied the conversation. It was presumptively offered and received only as impeaching him, and the Court might well have instructed the jury that they were to consider it only for that purpose, if so requested. Inasmuch as no such request was made, however, we can discover no specific reversible error in connection with it. The evidence was admissible at the time it was offered.

A former brakeman of the Burlington Railroad was allowed to testify that in 1898 the engines used by that company did not correspond with that described by the defendant as mounted and ridden by him on his alleged trip to Minneapolis on the night of the 15th. The witness had qualified himself by testifying that he knew the only type of engines which were used by that railroad. Whether this was true or not, it qualified him *prima facie* to state their characteristics, and that they did not have the appliances which defendant had described upon the engine boarded by him.

We find no other assignment of error which seems to require specific consideration in this opinion.

For the reasons above stated, the jury's decision of guilty is inconclusive. They have reached it only by considering facts which the law denies them the right to consider. They have been deprived of facts which the law required they should know and consider. It is, of course, greatly to be regretted that the great labor of this protracted trial should have been rendered futile by these errors therein. No such consideration can, however, bear any comparison in importance to the possibility that an innocent man is now suffering imprisonment at the hands of the government. That he is innocent is presumed in all courts until a conviction has been had without departure from the rules which the law, in its wisdom, has found necessary for the protection of the safety and freedom of the individual.

By THE COURT—Judgment reversed, and cause remanded for a new trial. The warden of the State Prison will deliver the plaintiff in error to the sheriff of Buffalo County, who is directed to keep the said Paulson in his custody until he is duly discharged therefrom, or until otherwise ordered according to law.

PEOPLE V. LAPIQUE.

136 Cal. 503—69 Pac. Rep. 226.

Decided June 7, 1902.

NEW TRIAL.—FORGERY.—INSTRUCTIONS: *Newly discovered testimony—What is not cumulative testimony—Financial condition of prosecuting witness—Misleading instruction.*

1. Where it appears that upon the trial of a defendant charged with the forgery of a note, the evidence was strongly conflicting and the evidence on the part of the prosecution, leaving out of view that for the defendant, was extremely slight and unsatisfactory, matters which in ordinary cases might be disregarded on motion for a new trial will be closely examined, and a new trial should be granted for newly discovered evidence that the prosecuting witness had declared that he himself had signed the note alleged to be forged, though such evidence is, in some sense, cumulative for the defendant.
2. Upon such trial it was clear error for the court to admit evidence of the financial condition of the prosecuting witness.
3. Where the testimony for the defendant proceeded wholly on the theory that the defendant did not sign the alleged forged note at all, an isolated instruction, that if the prosecution had not shown beyond a reasonable doubt that the defendant had no authority to sign the name of the prosecuting witness to the note, they must acquit the defendant, though not abstractly erroneous, may have improperly influenced the jury to take the instruction as an intimation by the court that the defendant actually signed the note.

Supreme Court of California, In banc.

Appeal from the Superior Court of the City and County of San Francisco; Hon. F. H. Dunne, Judge.

John Lapique, convicted of forgery, appeals.

Theodore J. Roche, for Appellant.

Tirey L. Ford, Attorney General, *A. A. Moore, Jr.*, Deputy Attorney General, and *Lewis F. Byington*, District Attorney, for respondent.

McFARLAND, J. The defendant was charged with, and convicted of the crime of forgery. He appeals from the judgment, and from an order denying his motion for a new trial.

After a careful consideration of the case, we are of the opinion that the conviction should not be allowed to stand.

The appellant was charged with forging the name of the prosecuting witness, Philip Maysounave, to a certain promissory note, dated November 15, 1898, purporting to have been made by said Maysounave, and payable to the order of Louise Legarde. Maysounave testified that he did not sign the note, or authorize any one to sign it; but, although he was intimately acquainted with appellant, he did not say that the signature to the note was made by appellant, or resembled his handwriting. The only evidence tending to connect appellant with the signature was the testimony of an expert in handwriting, and he did not undertake to say that the signature was written by appellant. He testified that, in his opinion, the signature to the note was not in the same handwriting as the admittedly genuine signature of Maysounave to a certain instrument in writing introduced in evidence, marked "Exhibit 2;" and he based his opinion upon his belief that the signature to the note was a tracing of the signature on Exhibit 2, or that the writer of the signature had the exhibit before him, and endeavored to closely copy it. It appeared, however, from oral and documentary evidence which we can hardly see any valid excuse for disregarding, that the note had been made and copied by witnesses long before Exhibit 2 was in existence, and therefore could not have been traced from the latter. There was also some testimony to the point that the prosecuting witness had admitted that he had signed the note, but that he had received no consideration from the woman who was payee therein, and that therefore he should not be called upon to pay it. The only testimony of this expert witness which tended to connect appellant with the alleged forgery was that the genuine handwriting of appellant and the disputed signature to the note showed some "similar characteristics." There was conflicting evidence on this point, and one witness, in particular, testified that he was well acquainted with

appellant's handwriting, and had great experience in examining signatures, and that the signature to the note was not that of appellant, nor in his handwriting. There was other evidence introduced by appellant greatly conflicting with that of the prosecution, which need not be here stated in detail.

The foregoing presents substantially the evidence in the case. It is not necessary to determine judicially whether or not this evidence, as a matter of law, is insufficient to sustain a conviction of a high felony. It is apparent, however, that it is not only strongly conflicting, but that the evidence on the part of the prosecution—leaving out of view that of the appellant—is extremely slight and unsatisfactory. Under such circumstances, matters which in ordinary cases might be disregarded should be closely examined.

We think that the court should have granted a new trial on the ground of newly discovered evidence presented by the affidavit of Charles W. Smyth, in which he swears that the prosecuting witness had told him that he himself had signed the note alleged to have been forged. There is no contention that this evidence was not new, or that it could, with reasonable diligence, have been discovered before the trial. It is contended, however, that it was merely cumulative, and was therefore no basis for a new trial. It was, no doubt, in a sense, cumulative, because there had been some evidence introduced at the trial on that general subject; but it is not the law that newly discovered evidence is not ground for a new trial merely because it comes within the category of "cumulative." It is, no doubt, the general rule that such evidence, when merely an addition to a mass of evidence of the same import and effect, differing in no way in its character and significance, would not warrant a new trial. Each case must depend upon its own circumstances. For instance, to put an extreme case, a mass of highly important newly discovered evidence should not be disregarded because there had been some slight, insignificant, and inconclusive evidence introduced at the trial on the same subject. Now, in the case at bar only two witnesses testified to the declarations of the prosecuting witness that he had signed the note. One of these witnesses was the defendant himself, and, of course, the testimony of a defendant in a criminal case is always taken by a jury with many grains of allowance. The other was the notary who protested the note, and although he was an unbiased witness, and

stated quite strongly in one part of his testimony that Maysounave admitted that he signed the note, still his testimony, taken altogether, leaves doubt as to whether or not he thoroughly understood what Maysounave said. But the affidavit of Smyth leaves no doubt on the subject. In his affidavit, after stating that Maysounave had informed him that he "had either signed said note at the request of said Louise Lagarde after the body of the instrument had been written, or that she had presented a blank piece of paper to him, to which he attached his signature at her request, and that thereafter the body of the instrument, purporting to be a promissory note, had been written over his signature," he proceeds as follows: "While affiant is not willing to swear positively to which one of these statements said Philip Maysounave made to him, he is almost confident that he informed him the body of the note had been written at the time the note was signed. Affiant, however, is positive, and therefore states positively, that the said Philip Maysounave then and there informed him that the signature appended to said promissory note so held by said Lapique, and which was made payable to Louise Lagarde, was actually signed by him at the request of said Louise Lagarde, but that said Philip Maysounave stated that there was no consideration for the note, which fact Lapique knew, and for that reason he did not think Lapique was acting fairly towards him in holding it against him." Under these circumstances, and considering the slightness of the evidence against the appellant, we think that justice demands that he should have the benefit of this evidence. No one can say that, if introduced at the trial, it would not have changed a verdict, the correctness of which is so doubtful.

Under the above views, it is not necessary to examine very closely the alleged errors committed by the court during the progress of the trial. It is clear, however, that an error was committed in admitting evidence of the financial condition of the prosecuting witness. The general rule is that such evidence is inadmissible, and we do not think that this case is within any of the exceptions to the rule; and, while in many cases such a ruling might be disregarded as unimportant, we cannot say that in so closely a balanced case as the one at bar it was not prejudicial.

The jury may also have been improperly influenced by the charge of the court to the jury that if the prosecution had not

shown beyond a reasonable doubt, "that the defendant had no authority to sign the name of Philip Maysounave, you must then acquit the defendant." There was no evidence offered by appellant, and no pretense made by him, that he was authorized to sign Maysounave's name to the note. His defense was that he did not sign it at all. Therefore, while the instruction was not, in the abstract, erroneous, and was one proper and necessary to be given in many cases, it was given in such an isolated manner in the case at bar that it may well have been taken by the jury as an intimation by the court that the appellant did actually sign the note, leaving only the question whether or not he was authorized to do so. No doubt, the court had no such intention, but we cannot say how it affected the jury.

We think that there are no other points in the case necessary to be considered. It may be noticed, however, that the jury was probably influenced by the improper allowance of a question on the cross-examination of appellant touching a former incident in his life, to which, however, no exception was taken.

The judgment and order appealed from are reversed, and a new trial ordered.

We concur: VAN DYKE, J.; HARRISON, J.; HENSHAW, J.; TEMPLE, J.

I concur in the judgment: GAROUTTE, J.

STATE v. LIFFRING.

61 Ohio St. 39—55 N. E. Rep. 168.,—76 Am. St. Rep. 358—46 L. R. A. 334.

Decided October 24, 1899.

OSTEOPATHY: *Not the practice of medicine.*

The "system of rubbing and kneading the body commonly known as 'Osteopathy,'" is not an "agency," within the meaning of Act Feb. 27, 1896, "to regulate the practice of medicine" (92 Ohio Laws, p. 44), which forbids the prescribing of any "drug or medicine or other agency" for the treatment of disease by a person who has not obtained from the Board of Medical Registration and Examination a certificate of qualification.

(Syllabus by the Court.)

Supreme Court of Ohio.

Exceptions from the Court of Common Pleas of Lucas County.

William J. Liffing was indicted for practicing medicine without a certificate. The Court sustained a demurrer to the indictment; and the State brings exceptions. Exceptions overruled.

F. S. Monnett, Attorney General, and *Charles Sumner (R. E. Westfall*, Associate Counsel) for the State.

I. N. Huntsbury, Foraker, Outcalt, Granger & Prior, and *Wilby & Wald*, for the defendant.

Statement of case:

In the Court of Common Pleas the following indictment was returned against Liffing:

"The State of Ohio, Lucas County—ss.: Court of Common Pleas of the September Term in the year of our Lord 1898. The jurors of the grand jury of the State of Ohio, within and for the body of the county aforesaid, on their oaths, in the name and by the authority of the State of Ohio, do find and present that William J. Liffing, late of the county aforesaid, on the 20th day of September in the year of our Lord 1898, at the county aforesaid, did knowingly, willfully, and unlawfully practice medicine in the State of Ohio without having first complied with the provisions of the act of the General Assembly of the State of Ohio entitled 'An act to regulate the practice of medicine in the State of Ohio,' passed February 27, 1896, in this: that at the time and place aforesaid he, the said William J. Liffing, did, for a fee, to-wit, the sum of two and 50/100 dollars prescribe, direct, and recommend for the use of one Carey B. McClelland a certain agency, to-wit, a system of rubbing and kneading the body, commonly known as 'osteopathy,' for the treatment, cure, and relief of a certain bodily infirmity or disease, the name and nature whereof is unknown to the grand jury; he, the said William J. Liffing, at the time aforesaid, not having left for record with the probate judge of that County, Lucas, a certificate from the State Board of Medical Registration and Examination of the State of Ohio entitling him to practice medicine or surgery within the State of Ohio, as required by the act aforesaid, and he, the said William J. Liffing, at the time aforesaid not being entitled under the act afore-

said, or the law of Ohio, to practice medicine and surgery, or either medicine or surgery, within the State of Ohio; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio." A demurrer was filed to this indictment, which, upon hearing, was sustained. To the ruling of the Common Pleas Court in that respect an exception was taken. The case is brought here upon exception, to obtain a decision of this court for the government of future cases.

OPINION.

SHLUCK, J. (after stating the facts). Counsel for the State urge upon us the view that when Liffing did "prescribe, direct and recommend for the use of one Carey B. McClelland a certain agency, to-wit, a system of rubbing and kneading the body commonly known as 'osteopathy,' for the treatment, cure, and relief of a certain bodily infirmity or disease," as charged in the indictment, he practiced medicine, as defined in section 4403f of the Act "to regulate the practice of medicine in Ohio," passed February 27, 1896 (92 Ohio Laws, p. 44), and not having procured from the State Board of Medical Registration and Examination, and left with the probate judge of the county, a certificate of qualification to practice medicine or surgery, as required by sections 4403e and 4403d of the Act, he is guilty of the misdemeanor defined in section 4403g, and subject to fine or imprisonment or both. The practice which the Act regulates is defined in section 4403f: "Any person shall be regarded as practicing medicine or surgery within the meaning of this Act who shall append the letters 'M. D.' or 'M. B.' to his name or for a fee prescribe, direct or recommend for the use of any person, any drug or medicine or other agency for the treatment, cure or relief of any wound, fracture or bodily injury, infirmity or disease." It does not seem to be supposed that the indictment charges the practice of surgery. But the proposition urged by the attorney general is that the "system of rubbing and kneading the body known as 'osteopathy,'" which the indictment does charge, is an agency, within the meaning of the statute, and that prescribing and directing the use of such agency is the offense defined by the statute; and it is urged that, unless we give so comprehensive a meaning to the word "agency," the associated words, "medicine" and "drug," will be denied all meaning, and the purpose of the act defeated. Our knowledge

of osteopathy is not definite. The word has not found recognition in the dictionaries. It is, however, certain that its use exceeds the suggestions of its etymology. The rubbing and kneading charged in the indictment are consistent with our general knowledge that, in practice, the adherents to osteopathy wholly reject drugs and medicines. The application of the theory that disease may be cured by the manipulation of different parts of the body would not, with close regard to the meanings of words, be called an agency. But assuming a meaning of the word which might justify its being so used, if that would be consistent with the associated words, we meet the suggestion that in obedience to the maxim, "*Noscitur a sociis*," the meaning of the word "agency" must be limited by that of the associated words, "drug" and "medicine." The cases in which the meanings of words have been thus limited are so numerous that the labor of collecting them appropriately belongs to the compilers of digests. Certainly this maxim should not be so applied as to defeat the object of legislation. It should always serve the rule that the object of construction is to ascertain intention. In substance, the view presented in support of the exception is that the legislature intended to prohibit the administration of any agency and the recommendation of any mode of treating diseases or patients, except by the holders of certificates from the board. That purpose would have been unmistakably expressed in fewer words than are employed in this act. With the assumed meaning of the word "agency," it would have been precisely expressed by this act if the words "drug" and "medicine" had been omitted. The maxim invoked is applicable to the case, because it serves the universal rule that, in seeking the meaning of an act, all of its words must be considered. It requires the conclusion that the agency intended by the legislature is to be of the general character of a drug or medicine, and to be applied or administered, as are drugs or medicines, with a view to producing effects by virtue of its own potency. The same conclusion will follow a more general, and less technical, view of the subject. The objection which its opponents urge against osteopathy is that it recognizes a fragment of truth, and assumes that it is the universe of truth, and that, by rejecting remedial agencies generally believed to be effective if rightly prescribed, it withholds from those who resort to it available means of relief and cure. It is not charged that it is otherwise hurtful,

nor that its administrations are attended with danger. The obvious purpose of the act under consideration is to secure to those who believe in the efficacy of medicines the ministrations of educated men, thus preventing fraud and imposition, and to protect society from the evils which result from the administration of potent drugs by the ignorant and unskillful. The purpose of the act is accurately indicated by its title to be "to regulate the practice of medicine." No provision of the act indicates an intention on the part of the legislature that those who do not propose to practice medicine shall graduate from a college of medicine, or otherwise become learned in its use. Without such knowledge no one is entitled to a certificate from the board of examination. The result of the view urged in support of the exception is that by this act the General Assembly has attempted to determine a question of science, and to control the personal conduct of the citizen without regard to his opinions, and this in a matter in which the public is no wise concerned. Such legislation would be an astonishing denial of the commonly accepted views touching the right to personal opinion and conduct which does not invade the rights of others. From the operation of constitutional provisions designed to establish and perpetuate freedom of thought and action in matters pertaining to religion, it results that in things which are of the first concern we are imperatively denied the guidance of legislative wisdom, and our immortal part is exposed to the enduring pain which is believed to follow the acceptance of religious error. In the absence of a statute clearly indicating it, the General Assembly will not be presumed to have intended the consequences involved in this contention. Exception overruled.

NOTE (By J. F. G.).—On April 14, 1900, the statute in regard to the practice of medicine was amended. In the amendment it was made to apply to those "who shall prescribe, or who shall recommend for a fee for like use, any drug or medicine, appliance, application, operation or treatment, of whatever nature, for the cure or relief of any wound, fracture, or bodily injury, infirmity, or disease." The amendment contained a proviso, that it should not apply "to any osteopath who holds a diploma from a legally chartered and regularly conducted school of osteopathy, in good standing as such, wherein the course of instruction requires at least four terms of five months in four separate years, providing that such osteopath shall pass an examination satisfactory to the State Board of Medical Registration and Examination, on the following subjects: Anatomy, physiology, chemistry, and physical diagnosis. Provided that such osteopath shall not be granted the

privilege of administering drugs nor of performing major or operative surgery."

Under this amendment an indictment was had in the Court of Common Pleas of Drake County, the indictment being as follows:

"The jurors of the grand jury of the county of Drake and the State of Ohio, then and there duly impaneled, sworn, and charged to inquire of and present all offenses whatever committed within the limits of said county, on their oaths, in the name and by the authority of the State of Ohio, do find and present: That Henry H. Gravett, late of said county, on the 11th day of September in the year of our Lord 1900, at the county of Drake aforesaid, did knowingly, willfully, and unlawfully practice medicine in the State of Ohio and county aforesaid without having first complied with the provisions of the act of the general assembly of the State of Ohio entitled 'An act to regulate the practice of medicine in the State of Ohio,' passed February 27, 1896 (92 Ohio Laws, p. 44), and amended April 14, 1900 (94 Ohio Laws, p. 197), in this: That at the time and place aforesaid he, the said Henry H. Gravett, did, for a fee, to-wit, the sum of five (\$5) dollars, prescribe and recommend for the use of one Martha Huddle a certain application, operation and treatment, to-wit, a system of rubbing and kneading the body, commonly known as 'osteopathy,' for the treatment, cure, and relief of a certain bodily infirmity or disease, the name and nature whereof is unknown to the jurors aforesaid; he, the said Henry H. Gravett, at the time aforesaid not having obtained or received from the state board of medical registration and examination of the State of Ohio a certificate entitling him, the said Henry H. Gravett, to practice medicine or surgery within the State of Ohio, as required by the act aforesaid; he the said Henry H. Gravett, at the time aforesaid not being entitled, under the act aforesaid, or laws of the State of Ohio, to practice medicine or surgery within the State of Ohio, contrary to the statute in such cases made and provided, and against the peace and dignity of the State of Ohio."

To this indictment the defendant demurred. The demurrer was sustained; and the State carried the case to the Supreme Court of Ohio on exceptions; but the exceptions were overruled December 3, 1901 in *State v. Gravett*, 65 Ohio State 289, 62 N. E. Rep. 325, 55 L. R. A. 791, 87 Am. St. Rep. 605. The syllabus by the Court, being as follows:

1. "The system of rubbing and kneading the body, commonly known as osteopathy," is comprehended within the practice of medicine defined by section 4403f of the Revised Statutes, as amended by the act of April 14, 1900.

2. One who has an established practice in the healing of diseases may be required to conform to such reasonable standard respecting qualification therefor as the general assembly may prescribe, having in view the public health and welfare.

3. A legislative enactment which discriminates against osteopaths by requiring them to hold diplomas from a college which requires four years of study as a condition to their obtaining limited certificates,

which will not permit them to prescribe drugs or perform surgery, while not requiring such time of study from those contemplating the regular practice as a condition to their obtaining unlimited certificates for the practice of medicine and surgery, is, as to such discrimination, void, and compliance therewith cannot be exacted to those who practice osteopathy.

Christian Science.—In *State v. Mylod*, 20 R. I. 632, 11 American Criminal Report 238, 41 L. R. A. 428, 40 Atl. Rep. 753, the court held that one practicing Christian Science was not liable under a statute regulating the practice of medicine.

HAYDEN v. STATE.

81 Miss. 291—95 Am. St. Rep. 471—33 So. Rep. 653.

Decided March 2, 1903.

OSTEOPATHY: *Not the practice of medicine.*

1. Osteopathy is not within the scope of the statute regulating the practice of medicine.
2. Scientific manipulating of the limbs, muscles, ligaments, and bones, does not come within the meaning of the statutory clause, "Appliance or agency."

Supreme Court of Mississippi.

Appeal from the Circuit Court, Alcorn County; Hon. Eugene O. Sykes, Judge.

H. Hayden, convicted of practicing medicine without a license, appeals. Reversed.

J. A. P. Campbell and *Boon & Curlee*, for the appellant.
Monroe McLurg, Attorney General, for the State.

TERRAL, J., delivered the opinion of the court:

Hayden was indicted in the Circuit Court of Alcorn County for practicing as a physician without first having been examined and obtained a license so to do. The facts of his alleged offense were admitted to be as follows, and upon this admission the case was submitted to the jury: "That the defendant practiced in this (Alcorn) county what is known as 'osteopathy' in the American School of Osteopathy, in Kirksville, Mo., from which school he is a graduate. That in treating diseases,

and in his treatment of the witnesses for the State in this case, to-wit, *W. W. Kemp and Jas. A. Carter*, he did not use any drug or medicine, but his treatment consisted of manipulating scientifically the limbs, muscles, ligaments and bones which were pressing on the nerves of the blood supply. This treatment was had so that nature would have free action. That in his treatment of disease or pains he is confined solely to his manipulation as above described. That for said services to said Carter and Kemp he received pay. The witnesses were being treated for rheumatism, and claimed that they have entirely recovered, as a result of this treatment." The above is agreed as being all the facts in the case. The court instructed the jury that, if they believed the admitted facts, they should convict the defendant. This they did, and thereupon the court imposed a fine of \$20 upon the defendant. From this judgment he appeals.

The sole question is whether, under chapter 68, Acts 1896, an osteopath is required to be examined and licensed for the practice of his branch of the healing art. The act of 1896, so far as it is necessary to be known for the right understanding of this case, provides: "That the practice of medicine shall mean to suggest, recommend, prescribe, or direct for the use of any person, any drug, medicine, appliance or agency, whether material or not material, for the cure, relief or palliation of any ailment or disease of the mind or body, or for the cure or relief of any wound or fracture or other bodily injury or deformity, or the practice of obstetrics or midwifery, after having received, or with the intent of receiving therefor, either directly or indirectly, any bonus, gift, profit or compensation." It is perfectly manifest, as we think, from the agreed statement of facts, that Hayden used neither drug nor medicine, as meant by the act of March 19, 1896. It is equally manifest to us that the legislature, by the use of the words "appliance and agency," did not intend to include such treatment as Hayden gave Carter and Kemp. Our attention has been called to no statement of osteopathic treatment in all the literature upon this subject which characterizes the treatment of an osteopath of his patient as an appliance or agency. There is an incongruity in such application of such words. Osteopaths themselves do not speak of their manipulation of the nerves, ligaments, bones, and other parts of the human body as being agencies or appliances of any sort or in any sense. In any strict and proper use of such words, they

cannot be so denominated. If one not an osteopath directs a blow at their art, it is becoming that he use a term of description not to be mistaken. We conclude that the act of March 19, 1896, was not intended to regulate the practice of osteopathy in Mississippi. The course of study and examination prescribed in our law upon this subject seems to mark it out as a curriculum of the allopaths. It at least suits them in many respects, but its chemistry and *materia medica* are not specially adopted to assist the practice of osteopathy. They make no use of the immense learning contained on these subjects, so highly valued by the regular physician. It appears to us that our legislation upon the subject of the practice of medicine has been framed by the allopaths to suit their views of the medical art, and with the laudable design of excluding from the practice the unskillful and the ignorant, and it was not intended to set up a universal standard of therapeutics, from which none could depart. Courts in other jurisdictions, where similar statutes prevail, have led the way for our decisions in this case. While our own views of the subject would probably have led us to the conclusion we have reached, yet, if the case had been otherwise we should have felt ourselves strongly constrained by the authority and reasoning contained in them. We refer to *State v. Liffing*, 61 Ohio St. 39, 55 N. E. 168, 46 L. R. A. 334, 76 Am. St. Rep. 358; *State of Rhode Island v. Mylod*, 20 R. I. 632 (11 Amer. Crim. Rep. 238), 40 Atl. 753, 41 L. R. A. 428; *Nelson v. Board* (Ky.) 57 S. W. 501, 50 L. R. A. 383. Alabama, with a statute widely divergent from ours, holds another view. But *Bragg v. State* 32 South. 767, sheds no light upon the construction of our statute.

A wise legislature some time in the future will doubtless make suitable regulations for the practice of osteopathy, so as to exclude the ignorant and unskillful practitioners of the art among them. The world needs and may demand that nothing good or wholesome shall be denied from its use and enjoyment.

The judgment below is reversed, the indictment quashed, and the defendant discharged.

NOTE (By J. F. G.).—The strenuous efforts of late being exerted to control, regulate or prohibit the practice of osteopathy, present an interesting subject, worthy of the lawyer's attention. The decisions, in their effect, may have a wider scope than this particular subject, for, they are liable to become precedents on other phases of governmental control of professions and avocations. So as to more fully present the

subject, we give six cases in full; but to economize in space, two lengthy opinions are incorporated in these notes as follows:

NELSON v. STATE BOARD OF HEALTH.

108 Ky. 769—50 L. R. A. 383—22 Ky. Law Rep. 438—57 S. W. Rep. 501.

Decided June 20, 1900.

Honson, J. Appellant, Harry Nelson, a citizen of this State, filed his petition in equity in the court below in which he alleged that, after he had taken a regular course of studies at the American School of Osteopathy at Kirksville, Mo., for a term of years, he became a graduate thereof on September 15, 1897; that since that date he has been practicing this system of healing for his support to the great comfort and relief of disease and sickness, having adopted it as his vocation in life; that osteopathy is a perfect system, having the approval of skilled and scientific men, and schools and colleges in which its doctrines are taught; that appellee was about to have him arrested for practicing osteopathy, or prosecute him therefor, under the act entitled "An act to protect citizens of this Commonwealth from empiricism," approved April 10, 1893, and the amendment thereto approved March 18, 1898; that this act is in violation of the Bill of Rights, and is unconstitutional, or, if valid, that under it appellee is discriminating against the system of medicine known as "osteopathy," refusing to recognize his diploma, or to give him a certificate; that the school referred to at which he graduated is a reputable medical college, chartered by the laws of Missouri, with a large body of learned professors, and a large patronage of pupils, and as such is entitled to be recognized and indorsed by the appellee. He prayed that appellee be enjoined from molesting him in his business or profession as an osteopath, or pursuing him criminally therefor, and, if he was not entitled to this relief, then that a writ of mandamus be awarded him compelling appellee to recognize and indorse the American College of Osteopathy at Kirksville, Mo., and issue him a certificate entitling him to follow his calling in this State. Appellee answered, denying the allegations of the petition, and pleading specially that the school referred to was not a reputable medical college, and that plaintiff, as a graduate of it, was not entitled to a certificate from it. On final hearing the court below dismissed the action, refusing the complainant any relief, and the correctness of this judgment is the question to be determined on this appeal.

The proof shows that osteopathy is a new method of treating diseases, which is said to have originated with Dr. A. T. Still, of Kirksville, Mo., about the year 1871. He practiced it more or less from that time until about the year 1890, when he opened a school for the instruction of others. In 1892 he obtained an imperfect charter for his school under the laws of Missouri. This was perfected in 1894 by a charter in regular form under which the school has since been operating. At the time the proof was taken

in this case there were in attendance at the school something over 500 scholars from 29 states of the Union, and several from Canada. In connection with the school was an infirmary, at which from 300 to 500 patients were regularly treated. There were twelve or thirteen professors in the school. Of these four were regularly graduated physicians, besides Dr. Still, who was a surgeon in the army during the Civil War, and is said to have been a college graduate; but the proof as to this is not clear. Another of the professors is a fellow of the Royal Society of England, and still another was for many years the Circuit Judge of that district. The buildings of the school are shown to be commodious, and suitable for its purposes. While its equipment at first was meager, it has gradually increased from time to time until now it would seem in some respects to compare favorably with other colleges. The patients treated at the infirmary, as well as those treated by appellant, appear to have been satisfied with what they received, and many of them to have been materially benefited. There are four or five other colleges of osteopathy, which, with the one at Kirksville, form an association, and in five States of the Union osteopathy has been recognized by statute. The testimony of the witnesses, the character of the professors, and the evident sincerity of their statements, leave no doubt in our minds that the school at Kirksville is a reputable school of osteopathy; but whether it is a reputable school of medicine, within the meaning of our statute, or what are appellant's rights if it is not, are very different questions, depending upon the proper construction of the act itself. The purpose of the statute, as shown by its title, was to protect the people of this State from empiricism. Its material provisions are as follows (Kentucky Statutes, sections 2611-2618):

"Section 2611. It shall be the duty of the county clerk of each county to purchase a book of suitable size, to be known as the 'Medical Register' of the county, and to set apart one full page for the registration of each physician. * * *

"Section 2612. It shall be unlawful for any person to practice medicine in any of its branches, within the limits of this State, who has not exhibited and registered in the county clerk's office of the county in which he resides his authority for so practicing medicine as herein prescribed, together with his age, address, place of birth and the school or system of medicine to which he professes to belong. * * *

"Section 2613. Authority to practice medicine shall be a certificate from the State Board of Health, and said board shall, upon application issue a certificate to any reputable physician who is practicing, or who desires to begin the practice of medicine in this State, who possesses any of the following qualifications: (1) A diploma from a reputable medical college legally chartered under the laws of this State. (2) A diploma from a reputable and legally chartered medical college of some other State or country, indorsed as such by the State Board of Health. (3) Satisfactory evidence from the person claiming the same that such person was reputably and honorably engaged in the practice of medicine in this State prior to February 23, 1864. (4)

Satisfactory evidence from any person who was reputably and honorably engaged in the practice of medicine in this State prior to February 23, 1884, who has passed a satisfactory practical examination before said board. * * *

"Section 2616. Nothing in this law shall be so construed as to discriminate against any peculiar school or system of medicine, or to prohibit women from practicing midwifery, or to prohibit gratuitous services in case of emergency; nor shall this law apply to commissioned surgeons of the United States army, navy, or marine hospital service, or to legally qualified physicians of another State called to see a particular case or family, but who does not open an office or appoint any place in this State where he or she may meet patients or receive calls.

"Section 2618. Any person living in this State or coming into this State, who shall practice medicine, or attempt to practice medicine in any of its branches, or who shall treat or attempt to treat any sick or afflicted person by any system or method whatsoever, for reward or compensation, without first complying with the provisions of this law, shall, upon conviction thereof, be fined fifty dollars, and upon each and every subsequent conviction shall be fined one hundred dollars and imprisoned thirty days, or either or both, in the discretion of the court or jury trying the case; and in no case where any provision of this law has been violated shall the person so violating be entitled to receive any compensation for the services rendered. To open an office for such purpose or to announce to the public in any way a readiness to treat the sick or afflicted shall be deemed to engage in the practice of medicine within the meaning of this act."

Empiricism is defined as "a practice of medicine founded on mere experience without the aid of science or the knowledge of principles." The above act is therefore "an act to protect the people of this commonwealth from the practice of medicine founded on mere experience, without the aid of science, or a knowledge of principles." To secure this, it requires a medical register to be kept by the county clerk of each county, and makes it unlawful for any person to practice medicine in any of its branches within the limits of the State until he has registered in the county of his residence. Authority to practice medicine under the statute can only be conferred by a certificate from the State Board of Health issued to a reputable physician, having a diploma from a reputable medical college legally chartered under the laws of this State, or, if chartered under the laws of some other State or country, indorsed as such by the State Board of Health. Persons engaged in the practice reputably and honorably prior to February 23, 1864, are, on proof of this fact, entitled to a certificate, and persons engaged in the practice reputably and honorably prior to February 23, 1884, may be given a certificate after a satisfactory examination before the board; but there is no authority in the act for the board to examine any one who was not engaged in the practice prior to February 23, 1884, or to issue a certificate to such a person unless he is a reputable physician having a diploma from a reputable col-

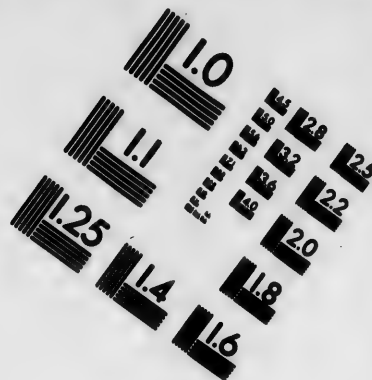
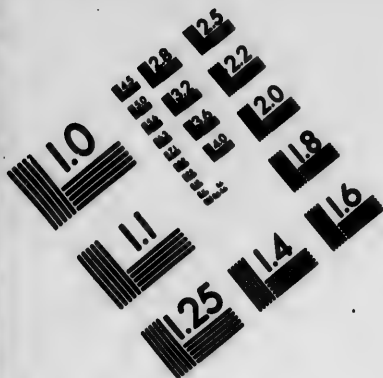
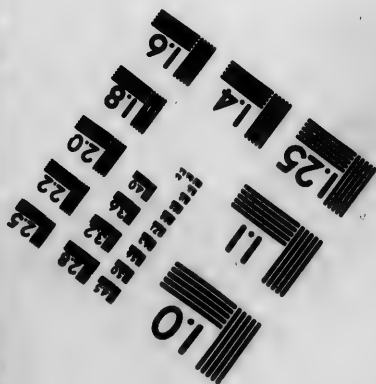
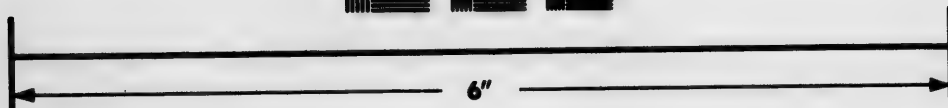
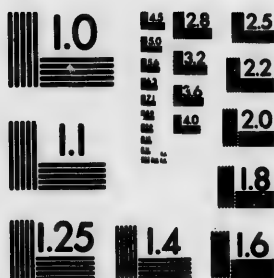


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lege; and without such a certificate it is made unlawful for any person to practice medicine in any of its branches within the limits of this State. The appellant, therefore, having graduated in the year 1897, and not being a practitioner of medicine in this State prior to February 23, 1884, could not be examined before the Board of Health, nor was he entitled to a certificate from it unless upon the ground that he held a diploma from a reputable and legally chartered medical college of the State of Missouri. It is contended for the appellee that the law has conferred upon it the sole power to determine whether a particular college is reputable, and should be indorsed as such by it. It is contended for appellant that appellee, by the express terms of the statute, is limited in power, and cannot discriminate against any peculiar school or system of medicine. It is urged with force that, if the refusal to indorse the school is essentially based on the system it teaches, rather than on the sufficiency of its instruction, the action of the board is without authority, and may be restrained by the courts.

This seems to us to be the true construction of the statute, and in a case where it was clear from the evidence that a discrimination had been made against a system of medicine we should not hesitate to hold that the board had exceeded its power. But, under the evidence, we are not inclined to think that the school referred to is a reputable medical college, within the meaning of the statute. The terms "physician," "practice medicine," and "medical college," used in the act, have a well-defined popular meaning, and were used, we think, by the legislature, in this sense. The term "physician" refers to those exercising the calling of treating the sick by medical agencies, as commonly practiced throughout the State at the time the act was passed. The term "medical college" refers to those schools of learning teaching medicine in its different branches, at which physicians at that time were educated, or schools of that character organized since. At such an institution an essential part of the instruction was in teaching the nature and effects of medicines, how to compound and administer them, and for what maladies they were to be used. In such institutions also surgery is an essential part of the instruction. Without a knowledge of surgery or medical agencies, no person would be deemed equipped to practice medicine by any medical college; for these things lie at the base of the instruction given in such schools. Osteopathy teaches neither therapeutics, *materia medica*, nor surgery. Bacteriology is also ignored by it. As we understand the record, it relies entirely on manipulation of the body for the cure of diseases. Its theory is that a large number of ailments are due to irregular nerve action, and that by stimulating or repressing the nerve centers by manipulation they enable nature herself to right the evil. It administers no drugs; it uses no knife. It does not profess to cure all diseases. When a case is presented requiring surgery or medication, the osteopath gives way to the physician. Faith cure or magnetism has no place in the system. It relies wholly upon manipulation aiding the *vis medicatrix naturae*. The main things taught in the school are physiology, anatomy, and the treatment of diseases by

manipulation. The system is new, and, of necessity, imperfect as yet, but, if we may credit the evidence in this record, is often efficacious where the regular practice is ineffective. Still a school which teaches neither surgery, bacteriology, *materia medica*, nor therapeutics cannot be regarded as a medical college within the popular meaning of those terms as understood in this State when the act in question was passed.

Having reached the conclusion that the school at which appellant graduated is not a medical college within the meaning of the statute, it remains for us to inquire whether the act applies to him at all. The subject-matter in the minds of the legislature in passing the act was to protect the people of the State from the practice of medicine founded merely on experience without scientific knowledge. To effect this it allows only reputable physicians holding a diploma from a regular or reputable school to practice medicine with an exception in favor of those then already long engaged in the practice. If the act applies to appellant, he can in no case practice his system in this State; for, however well qualified he may be, he cannot be examined for license as a physician, and he could not, without abandoning his practice as an osteopath, obtain a diploma from a medical college. If the statute applies to him, it also applies to trained nurses, and all others of that class, who, for compensation, administer to the wants of the sick. The result of such a construction of the statute would be to compel every one, whether willing or unwilling, to employ a registered physician to care for him when he is sick, or to trust himself entirely to gratuitous services, however much he might prefer skillful nursing to medical treatment. It is doubtful if the legislature has the right under the Constitution thus to restrict the free choice of the citizen in a matter concerning only himself and not the people at large. Taking the statute as a whole, we do not think that this was within the legislative intent, or that the act was designed to do more than regulate the practice of medicine by physicians and surgeons.

After it was first passed in this State, there was a separate statute passed applicable to dentists, and still another for pharmacists; thus showing that the legislature intended the act before us to apply only to physicians. Until these acts were passed, there were no requirements established by law for the practice of medicine in this State, and in undertaking to regulate the practice of medicine it should not be presumed that the legislature intended to interfere with trained nurses, or others, who, for compensation, attended on the sick without undertaking to prescribe medicine or to follow the calling of a physician; for such persons are not within the spirit of the act, and could not well have been in the mind of the legislature when enacting it. A statute precisely similar to ours in purpose was passed in the State of New York. In *Smith v. Lane*, 24 Hun, 632, a person treating disease like appellant was charged with violating the act. The court held him not within the statute. Among

other things, the court said: "The practice of medicine is a pursuit very generally known and understood, and so, also, that of surgery. The former includes the application and use of medicines and drugs for the purpose of curing, mitigating, or alleviating bodily diseases, while the functions of the latter are limited to manual operations usually performed by surgical instruments or appliances, it was entirely proper for the legislature, by means of this chapter, to prescribe the qualification of the persons who might be intrusted with the performance of these very important duties. The health and safety of society could be maintained and protected in no other manner. To allow incompetent or unqualified persons to administer or apply medical agents, or to perform surgical operations, would be highly dangerous to the health as well as the lives of the persons who might be operated upon, and there is reason to believe that lasting and serious injuries, as well as the loss of life, have been produced by the improper use of medical agents and surgical instruments or appliances. It was the purpose and object of the legislature by this act to prevent a continuance of deleterious practices of this nature, and to confine the use of medicines and the operations of surgery to a class of persons who, upon examination, should be found competent and qualified to follow these professional pursuits. No such danger could possibly arise from the treatment to which the plaintiff's occupation was confined.

While it might be no benefit, it could hardly be possible that it could result in harm or injury. * * * His system of practice was rather that of nursing than that of either medicine or surgery. * * * He neither gave nor applied drugs or medicines, nor used surgical instruments. He was outside of the limits of both professions, and neither of the schools or societies mentioned in the act had jurisdiction over him." A statute very similar to ours was passed in the State of Ohio, and in *State v. Liffing*, 61 Ohio St. 39, 76 Am. St. Rep. 358, 55 N. E. 168, 46 L. R. A. 334, the question was presented to the Supreme Court of the State whether an osteopath was included in the statute. It was held that he was not. The court said: "The obvious purpose of the act under consideration is to secure to those who believe in the efficacy of medicines the ministrations of educated men, thus preventing fraud and imposition, and to protect society from the evils which result from the administration of potent drugs by the ignorant and unskillful. The purpose of the act is accurately indicated by its title to be 'to regulate the practice of medicine.' No provision of the act indicates an intention on the part of the Legislature that those who do not propose to practice medicine shall graduate from a college of medicine, or otherwise become learned in its use. Without such knowledge, no one is entitled to a certificate from the board of examination.

The result of the view urged in support of the exception is that by this act the General Assembly has attempted to determine a question of science, and control the personal conduct of the citizen without regard to his opinion; and this is a matter in which the public is in no wise concerned. Such legislation would be an astonishing denial

of the commonly accepted views touching the right to personal opinion and conduct, which does not invade the right of others." A similar ruling was made in Rhode Island. *State v. Mylod*, 20 R. I. 632, 41 L. R. A. 428, 40 Atl. 753. (11 Amer. Crim. Rep. 238.) While the phraseology of our statute is in some respects different from that before the court in either of these cases, the purpose of the act is plainly the same, and we think the same construction should be adopted. The thing in the mind of the legislature, and declared by the act to be unlawful, is "for any person to practice medicine in any of its branches within the limits of this State" without a certificate from the State Board of Health. Section 2612.

And as the board is only authorized to issue a certificate to a reputable physician having a diploma from a reputable medical college, and no discrimination is allowed against any peculiar school or system of medicine, the penalties provided by the last section of the act must be limited to that which is referred to in the title and previous sections—the practice of medicine in some of its branches in this State; and the words, "who shall practice medicine or attempt to practice medicine in any of its branches or who shall treat or attempt to treat any sick or afflicted person by any system or method whatsoever, for reward or compensation, without first complying with the provisions of this law," must be held to refer to physicians or surgeons belonging to some school or system of medicine practicing or desiring to practice medicine in this State, as provided in the preceding section; otherwise, this section would be made to include those not provided for in the preceding section, and the effect of the act would be not to protect the people of this State from the unscientific practice of medicine, but to deny to the sick all ministrations not gratuitous, unless by registered physicians. Thus construed, the act would be for the protection rather of the doctors of the State than of the people; and, in view of the general custom before and since this act of hiring nurses and others to care for the sick, we are of the opinion that such a construction would do violence to the actual intention of the legislature. Appellant is in no proper sense a physician or surgeon. He does not practice medicine. He is rather on the plane of a trained nurse. If by kneading and manipulating the body of the patient he can give relief from suffering, we see no reason why he should not be paid for his labor as others laborers. Services in kneading and manipulating the body are no more the practice of medicine than services in bathing a patient to allay his fever or the inflammation of a wound. Appellant may not prescribe or administer medicine or perform surgery, but, so long as he confines himself to osteopathy, kneading and manipulating the body, without the use of medicine or surgical appliances, he violates no law, and appellee should not molest him. On the return of the case the court below will enter judgment granting appellant a perpetual injunction restraining appellee from interfering with him or prosecuting him for the practice of osteopathy as above indicated. Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.

Petition for re-hearing filed by appellee and overruled. Judge Du Relle, dissenting.

STATE V. BIGGS.

133 N. C. 729—98 Am. St. Rep. 731—46 S. E. Rep. 401.

Decided December 18, 1903.

CLARK, C. J. The defendant is indicted on a charge that he "did unlawfully and willfully begin, engage in, and continue the practice of medicine and surgery, and the branches thereof, for fee or reward, without having obtained a license so to do from the Board of Medical Examiners of the State of North Carolina." Upon the facts found, the court was of opinion that the defendant was guilty. The defendant appealed from the judgment imposed.

The special verdict found that the defendant advertised himself as a "non-medical physician;" that he held himself out to the public to cure disease by a "system of drugless healing, and treats patients by said system without medicine, claiming not to cure by faith;" that he advertises to cure by "natural methods," without medicine or surgery. The only acts that he is found by the verdict to have performed are that "he administers massage baths and physical culture, manipulates the muscles, bones, spine, and solar plexus, and kneads the muscles with the fingers of the hand. He writes no prescriptions as to diet, but advises his patients what to eat and what not to eat; all the above treatment is administered to the exclusion of drugs." It was admitted that the defendant was not licensed by the State Medical Board, and claims no exemption, under the provisions of the act of 1903, as a nurse, or midwife, nor as one curing by prayer, and then there is the important finding that "the defendant charges a fee or reward for his services," and has treated patients by the above treatment, and received payment therefor, since the passage of chapter 697, Laws 1903, "To define the practice of medicine and surgery."

Section 3124 of the Code requires that every person who applies for license to practice "medicine or surgery or any of the branches thereof" shall stand an examination in "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, *materia medica*, therapeutics, obstetrics and the practice of medicine." There was added by chapter 117, Laws 1885, the following provision: "And any person who shall begin the practice of medicine or surgery in this State for fee or reward, after the passage of this act, without first having obtained license from said Board of Examiners (meaning the State Board of Medical Examiners) shall not be entitled to sue for or recover before any court any medical bill for services rendered in the practice of medicine or surgery or any of the branches thereof, but shall also be guilty of a misdemeanor and upon conviction thereof shall be fined not less than \$25, nor more than one hundred dollars or imprisoned at the discretion of the court for each and every offense."

The constitutionality of this last act has been vigorously assailed in the courts, on the ground that every one had an "inalienable right to life, liberty and the pursuit of happiness," as our great Declaration phrases it, and that by that guaranty it is the right of every one to earn his livelihood by pursuing any calling or vocation not unlawful, and that to place his liberty to do so within the power of a committee chosen by those already pursuing any given calling would be to infringe upon Section 7, Article 1 of our State Constitution, which forbids exclusive privileges and emoluments to any set of men, and Section 31 of the same article, which prohibits "monopolies and perpetuities." Of late years there has been added the argument that such act is also obnoxious to the Fourteenth Amendment to the Constitution of the United States, which prohibits any State "to deny to any person the equal protection of the law."

There was undeniably great force in the argument on that side. The lawmaking power slowly, in this State and in others, yielded to the view that it could or should pass such act. In 1858-59 chapter 253, it first incorporated "The State Medical Society," and authorized the above examination, and prohibited any one to practice medicine or surgery or prescribe for the cure of diseases, for fee or reward, without such license, but was careful to add a proviso that no one who should practice without such license should be guilty of a misdemeanor, the only penalty being that if he practiced on credit he could not recover his fees in the courts. The law remained thus till the above recited act passed in 1885, and which was made prospective. The constitutionality of this last statute was fully considered, and after a most able argument against it by counsel was sustained by this court, but not without great hesitation, and upon the ground solely that the act was "an exercise of the police power for the protection of the public against incompetents and impostors, and in no sense the creation of a monopoly or special privilege." *State v. Call*, 121 N. C. 646, 28 S. E. 517. If the object of the act could be construed as intended to give special and exclusive privileges to a special body of men, and not solely and in truth for the protection of the public. The legislature was prohibited by the Constitution from enacting it, nor could the legislature restrict the cure of the body to the practice of "medicine and surgery," or establish any State system of healing. *State v. McKnight*, 131 N. C. 723, 42 S. E. 580, 59 L. R. A. 187.

After these decisions, moderation and wisdom would have suggested that the matter rest. Those who wish to be treated by practitioners of medicine and surgery had the guaranty that such practitioners had been duly examined and found competent by a board of gentlemen eminent in that high and honorable profession, and those who had faith in treatment by methods not included in the "practice of medicine and surgery," as usually understood, had reserved to them the right to practice their faith and be treated, if they chose, by those who openly and avowedly did not use either surgery or drugs in the treatment of diseases. The courts have declared that they possessed this right, and that the legislature could not, under the Constitution,

restrict all healing to any one school of thought or practice. What is "the practice of medicine and surgery" is as well understood, and its limits, as the practice of dentistry. The courts have also held that of the many schools of "medicine and surgery" the legislature could not prescribe that any one was orthodox and the others heterodox, but that those professing the different system—"allopathic," "homeopathic," "Thompsonian," and the like—should be examined upon a course such as is taught in the best colleges of that school of practice, but that it is not essential that a member of each, or of any special school, should be upon the Board of Examiners.

At the last session of the General Assembly the following act (1903, ch. 697) was passed amendatory of section 3122 of the Code: "For the purpose of this act the expression 'practice of medicine and surgery' shall be construed to mean the management for fee or reward of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever; provided that this shall not apply to midwives nor to nurses; provided further, that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in their regular colleges, to-wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis, and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis; provided this act shall not apply to any person who ministers to or cures the sick or suffering by prayer to Almighty God, without the use of any drug or material means."

Chief Justice Pearson, in *McAden v. Jenkins*, 64 N. C. 301, noted, as of common knowledge, and reiterated in *Railroad v. Jenkins*, 68 N. C. 505, that railroad charters are drafted by "promoters," and hence should be construed most strongly against the grantees and in the interest of the public. The same construction can fairly be applied to this act amendatory of the charter of this corporation, in whose supposed interests it was evidently drafted, and not solely in the interest of the public. Under the guise of "construction" of those well-understood terms, the "practice of medicine and surgery," the act essays to provide that the expression "'practice of medicine and surgery' shall be construed to mean the management 'for fee or reward' of any case of disease, physical or mental, real or imaginary, with or without drugs, surgical operation, surgical or mechanical appliances, or by any other method whatsoever." That is, the practice of surgery and medicine shall mean practice without surgery or medicine, if a fee is charged. If no fee is charged, then the words "surgery and medicine" drop back to their usual and ordinary meaning, as by long usage known and accustomed. Where, then, is the protection to the public, if such treatment is valid when done without fee or reward? Yet, unless the act confers, and is intended solely to confer, protection upon the public, it is invalid. The legislature cannot

forbid one man to practice a calling or profession for the benefit or profit of another.

Again, the act means more than its friends probably intended, for it says, "any case of disease, physical or mental, real or imaginary." Is not a disease of the eye physical, and is not a disease of the ear, or of the teeth, or a headache, or a corn, physical? Then every dentist and aurist and oculist is indictable unless he has also license from the State Medical Society as an M. D., as is also every corn doctor who relieves aching feet, and every peripatetic of stentorian lungs on the courthouse square who banishes headache, real or imaginary, by rubbing his hands over some credulous brow. He, too, must be an M. D. Then there is the closing expression, forbidding treatment "for fee or reward" by other than an M. D. "by any other method whatsoever." This would take in all the old women and the herb doctors, who, without pretending to be professional nurses, relieve much human suffering, "real or imaginary," for a small compensation. Then it is forbidden to relieve a case of suffering, "physical or mental," in any method unless one is an M. D. It is not even admissible to "minister to a mind diseased" in any method, or even dissipate an attack of the "blues," without that label, duly certified. Is not this creating a monopoly, and the worst of monopolies, that diseases shall not be cured or alleviated, whether real or imaginary, mental or physical, though without medicine or surgery, "if for a fee," unless one has undergone an examination on "anatomy, physiology, surgery, pathology, medical hygiene, chemistry, pharmacy, *materia medica*, therapeutics, obstetrics and the practice of medicine?" Such an examination is eminently proper for one who holds himself out as an M. D., and those who wish to employ an M. D. should certainly have the guaranty that is given by his license that the M. D. is competent. But how about those who are too poor or too ignorant or too perverse, to wish that kind of treatment? It is requisite that the man who treats a diseased ear shall really be competent in obstetrics, or that it is a penalty to treat a disease of the eye unless the operator understands chemistry, or that it is indictable in this State to remove corns or to plug teeth without full knowledge of the *materia medica*, or to banish headache by the application of the hands without having passed a satisfactory examination on anatomy, or to apply a fomentation without being able to "pass up" on therapeutics, or to sell a little herb tea for the stomach ache without being scientifically versed in pathology and physiology? The act is too sweeping. Besides, the legislature could no more enact that the "practice of medicine and surgery" shall mean "practice without medicine and surgery" than it could provide that "two and two make five," because it cannot change a physical fact. And when it forbade all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by an M. D., it attempted to confer a monopoly on that method of treatment, and this is forbidden by the Constitution.

Our early legislation naturally gave physicians no special privileges, but it was directed solely to fixing a limitation upon their charges

and providing penalties for malpractice. Were a monopoly of all treatment of diseases conferred upon M. D.'s, it would necessarily follow that the legislature would have to prescribe their scale of charges again. That matter could not, with due regard to the public interest, be left to a monopoly. The medical profession merited and obtained a due share of prosperity prior to above statute of 1903 and will receive no great detriment because the defendant cannot be punished under its provisions.

Those not M. D.'s contend that the allopathic system of practice is contrary to the discoveries of science and injurious to the public. Some M. D.'s doubtless believe that all treatment of disease, except by their own system, is quackery. Is this point to be decided by the M. D.'s themselves, through an examination committee of five of their own number, or is the public the tribunal to decide, by employing whom each man prefers, whether allopath, homeopath, osteopath, or the defendant? The law says that the M. D.'s may examine and certify whether an applicant is competent to be one of their number, and no one can practice medicine and surgery without it; but they cannot decide for mankind that their own system of healing is now and ever shall be the only correct one, and that all others are to be repressed by the strong arm of the law. This act admits Christian Scientists to practice to cure diseases without such examination. By what process of reasoning can massage, baths, and the defendant be excluded? In the cure of bodies, as in the cure of souls, "orthodoxy is my doxy, heterodoxy is the other man's doxy," as Bishop Warburton well says. This is a free country, and any man has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use. If he gets improper treatment for children or others under his care, whereby they are injured, he is liable to punishment; but whether it was proper treatment or not is a matter of fact, to be settled by a jury of his peers, and not a matter of law, to be decided by a judge, nor prescribed beforehand by an act of the legislature.

The practice of medicine and surgery, in the usual and ordinary meaning of that term, is of the highest antiquity and dignity. In the Code of Hammurabi, King of Babylon, fifteen centuries older than the Code of Moses, and which, engraved on a column of black diorite, was but recently dug up at Susa, in ancient Elam, there are found (section 215-225) regulations of the medical profession, fixing a scale of fees, and penalties for malpractice. Physicians are mentioned in both the Old and New Testaments. Jeremiah asks, "Is there no balm in Gilead? Is there no physician there?" The public have a right to know that those holding themselves out as members of that ancient and honorable profession are competent, and duly licensed as such. The legislature can exert its police power to that end, because it is a profession whose practice requires the highest skill and learning. But there are methods of treatment which do not require much skill and learning, if any. Patients have a right to use such methods if they wish, and the attempt to require an examination of the character

above recited for the application of such treatment is not warranted by any legitimate exercise of the police power. The effect would be to prohibit to those who wish it those cheap and simple remedies, and deprive those who practice them of their humble gains, by either giving a monopoly of such remedies to those who have the title M. D., or prohibiting the use of such remedies altogether, neither of which results the Legislature could have contemplated, and both of which are forbidden by the provisions of the Constitution above cited.

In this case the defendant is found guilty of the following acts, and no more:

- (1) Administering massage baths and physical culture.
- (2) Manipulating muscles, bones, spine, and solar plexus.
- (3) Kneading the muscles with the fingers of the hands.
- (4) Advising his patients what to eat and what not.

And all this without prescriptions, without any drugs or surgery. These acts, by the terms of the statute, are harmless and not indictable, "unless done for fee or reward." There is nothing in this treatment that calls for an exercise of the police power by way of an examination by a learned board in obstetrics, therapeutics, *materia medica*, and the other things, a knowledge of which is so properly required for one who would serve the public faithfully and honorably as a doctor of medicine.

It is not only in the scope of the police power for the State to regulate the "practice of medicine and surgery," and to throw around the public any reasonable protection against unfit members of that honorable profession, and provide against malpractice, but the General Assembly can prohibit any pretended art of healing which is calculated to deceive and injure the public. It is also within its power to protect the public against the ignorant and vicious who profess knowledge and skill in any art or profession of healing in which technical knowledge and learning are required to safely and properly practice it. But it is not found here that the defendant is deceiving and injuring the public, or is ignorant and incompetent, to the detriment of the public, in the application of the methods he uses. It may be that if he were not there some of the patients might call in an M. D., but that is due possibly to the ignorance or perversity of the patients, who may prefer the defendant's methods and scale of fees. The police power does not extend to such cases.

The law is thus stated in *Lawton v. Steele*, 152 U. S. pp. 137, 138, 14 Sup. Ct. 501, 38 L. Ed. 385: "The legislature may not, under the guise of protecting public interests, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination of what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts." After citing cases, it is said on page 138: "In all those cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations, harmless in themselves, and which might be carried on without detriment to the public in-

terests." See, also, *State v. Pendergrass*, 106 N. C. 667, 10 S. E. 1002; *Ohio v. Gardner*, 58 Ohio St. 599, 51 N. E. 136, 41 L. R. A. 689, 65 Am. St. Rep. 785.

License is required for the practice of pharmacy, of dentistry, of law, and many other skilled professions. We have a State system of law, for the "Law is the State," and laws are prescribed by the legislature; and we also have a State system of education. Yet it is not indictable for one not a lawyer to draw wills, deeds, bills of sale, or any other legal instrument whatever, nor is it made punishable to settle litigation out of court by arbitration or otherwise, without the aid of a lawyer, nor to teach in other than the State schools. Though there are many methods of treating diseases, among which the legislature is not authorized to select one as the State system, excluding all others, yet this act, if valid, would make it punishable by law to charge a fee for treatment of "any disease, real or imaginary, mental or physical, by any method whatever," unless the party has been admitted by a committee from one school of treatment, upon examination of that system, thus denying mankind any relief from pain and suffering, except at the hands of that particular school of medical thought. It may be, and probably is, the best system. But that is a matter which must be decided by those who seek and must pay for the relief—not by the M. D.'s themselves, nor by the courts. Judges are lawyers, and are not competent to decide, except for themselves as individuals, which is the best system of treatment, and those practitioners who eschew medicine and surgery have a right to object to leaving the question whether "medicine and surgery" is the only permissible method of treatment to be decided by the practitioners of that method.

The defendant is not charged nor shown to be an osteopath, and disclaims being one. His learned counsel contends that Acts 1903, c. 697, is further unconstitutional because of the following (quoted from his brief): "There is no provision for the examination of any but allopaths and osteopaths. It provides that all persons, except midwives, nurses, and those who profess to heal by prayer, who minister to the sick for fee or reward, 'by any other method whatsoever,' shall be construed to be practicing medicine or surgery, and then follows this language: 'Provided further that applicants not belonging to the regular school of medicine shall not be required to stand an examination except upon the branches taught in the regular colleges, to-wit, the osteopaths shall be examined only upon descriptive anatomy, general chemistry, histology, physiology, urinalysis and toxicology, hygiene, regional anatomy, pathology, neurology, surgery, applied anatomy, bacteriology, gynecology, obstetrics and physical diagnosis.' The osteopath is required to stand an examination in surgery and every other branch that those belonging to the regular school of medicine are required to be examined in except pharmacy, *materia medica*, therapeutics, and the practice of medicine, and, in addition, he is required to stand an examination in branches that the regular medical student is not required to be examined on, as follows: 'Histology, urinalysis and toxicology, regional anatomy, neuro-

ogy, bacteriology, gynecology and physical diagnosis.' But it is remarkable that he is not required to pass examination in the branches that his profession recognizes and teaches to be of special importance in the practice of osteopathy, such as principles of osteopathy, osteopathic manipulations, and osteopathic diagnosis."

As his client is not an osteopath, we are not called upon in this case to pass upon the alleged discrimination against osteopaths in the prescribed course of study. But if it be objected that we have only shown that the defendant's practice did not call for the examination required, as above set out, for an allopath, it may be as well to say that the acts of which he was convicted of doing "for a fee," to-wit, using massage baths, physical culture, manipulating muscles, bone, spine, and solar plexus, and advising his patients as to diet, could be done as safely to the public, so far as shown, without an examination on "histology, urinalysis and toxicology, bacteriology, neurology, and gynecology," which are some of the things added to the course by the aforesaid act, for the comfort and convenience of those wishing to obtain license to practice osteopathy, and, of course, only to protect the public against incompetents in that line of practice.

It is possible, however, that an expert knowledge of gynecology is not essential in administering baths, and there is room for serious doubt whether bacteriology and toxicology are connected with massage in any way.

The term "practice of medicine and surgery" embraces probably the larger, and certainly by far the most profitable, part of the "treatment of diseases," but is not coextensive with the latter term, and cannot be made so, unless "surgery and medicine" are adopted as the State system of treatment—a monopoly—and all other methods are made indictable. On the other hand, the State Medical Society would hardly wish to broaden out so as to take in all methods of treatment of diseases, for this would be to take in practitioners, and practices which they would not wish to recognize. All the law so far has done or can do is to require that those practicing on the sick with knife and drugs shall be examined and found competent by those "of like faith and order." Dr. Oliver Wendell Holmes, in an address before the Medical Society in Massachusetts, said: "If the whole *materia medica* was sunk to the bottom of the sea, it would be all the better for mankind and all the worse for the fishes." An eminent medical authority in this State has said that out of twenty-four serious cases of disease, three could not be cured by the best remedies, three others might be benefited, and the rest would get well anyway. Stronger statements could be cited from the most eminent medical authorities the world has known. Medicine is an experimental, not an exact, science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, like the knife and drugs, but it cannot forbid dispensing with them. When the Master, who was himself called the Good Physician, was told that other than his followers were casting out devils and curing diseases, he said, "Forbid them not."

Upon the special verdict, the defendant should be adjudged not guilty.

Reversed.

WALKER AND CONNOR, J. J., concur in result.

PEOPLE FOR USE OF STATE BOARD OF HEALTH. v. GORDON.

194 Ill. 560—88 Am. St. R. 165—62 N. E. Rep. 858.

Opinion filed February 21, 1902.

OSTEOPATHY: *Practice of medicine—Constitutional law—Title of act.*

1. Section 7 of the Medicine and Surgery Act of 1899 (Laws of 1899, p. 275), which provides that any person shall be regarded as practicing medicine "who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury or deformity of another," is constitutional.
2. One who advertises himself as a magnetic healer, and who gives treatments, after diagnosis, by rubbing or kneading the body, for the purpose of freeing the nerve force, in the nature of osteopathic treatment, is practicing medicine within the meaning of section 7 of the Medicine and Surgery Act of 1899, notwithstanding he does not use drugs, medicine or instruments; nor is he within the exception in favor of those treating the sick by mental or spiritual means, even though he accompanies his treatment by mental suggestion to his patients that their ailments are not incurable.

People v. Gordon, 96 Ill. App. 456, Reversed.

Supreme Court of Illinois.

Appeal from the Appellate Court of the Second District; heard in that Court on appeal from the Circuit Court of Winnebago County; the Hon. John C. Garver, Judge, presiding.

This is an action of debt by the people, for the use of the State Board of Health, against Joseph P. Gordon, to recover a penalty for practicing medicine without a license, contrary to the provisions of the act of 1899, entitled "An act to regulate the practice of medicine in the State of Illinois, and to repeal an act therein named." Hurd's Rev. St. 1899, p. 1143. The suit was originally begun before a justice of the peace in Winnebago County, where there was a judgment for defendant. On the trial, on appeal to the Circuit Court of that county, at the close of all the evidence, the jury, by direction of the court,

returned a verdict for the defendant, upon which judgment was entered. The Appellate Court for the Second District has affirmed that judgment, and the cause is brought here by the people, for the use, etc., upon further appeal.

So much of the act as is applicable to the case is as follows:

"Sec. 2. No person shall hereafter begin the practice of medicine or any of the branches thereof, or midwifery, in this State without first applying for and obtaining a license from the State Board of Health to do so. * * * Applications from candidates who desire to practice medicine and surgery in all their branches shall be accompanied by proof that the applicant is a graduate of a medical college or institution in good standing, as may be determined by the board. When the application aforesaid has been inspected by the board and found to comply with the foregoing provisions, the board shall notify the applicant to appear before it for examination, at the time and place mentioned in such notice. * * * The examination of those who desire to practice medicine and surgery in all their branches shall embrace those general subjects and topics, a knowledge of which is commonly and generally required of candidates for the degree of doctor of medicine, by reputable medical colleges in the United States. * * * The examination of those who desire to practice any other system or science of treating human ailments who do not use medicines internally or externally, and who do not practice operative surgery shall be of a character sufficiently strict to test their qualifications as practitioners."

This section then provides for making rules for the examination by the board, which shall provide for a fair and wholly impartial method of examination, and "that graduates of legally chartered medical colleges in Illinois in good standing, as may be determined by the board, may be granted certificates without examinations."

"Sec. 3. If the applicant successfully passes his examination, or presents a diploma from a legally chartered medical college in Illinois of good standing, the board shall issue to such applicant a license authorizing him to practice medicine, midwifery or other system of treating human ailments, as the case may be:

"*Provided*, that those who are authorized to practice other systems cannot use medicine internally or externally or perform surgical operations:

"Provided further, that only those who are authorized to practice medicine and surgery in all their branches shall call or advertise themselves as physicians or doctors."

The section then authorizes the issuing of licenses in such form as the board may determine, in accordance with the provisions of the act, and further provides that, for any willful violation on the part of an applicant of any of the rules and regulations of the board governing examination, the board may refuse to issue a license to such applicant.

The fourth section provides for recording certificates, and the fifth for the fees which may be charged for the examination, authorizing certain fees for a certificate to practice medicine and surgery, and the same fee for all other practitioners. Section 6 provides that the board may refuse to issue certificates under certain circumstances therein stated. Section 7 is as follows:

"Sec. 7. Any person shall be regarded as practicing medicine, within the meaning of this act, who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another: *Provided*, that nothing in this section shall be construed to apply to the administration of domestic or family remedies in cases of emergency, or to the laws regulating the practice of dentistry or of pharmacy. And this act shall not apply to surgeons of the United States army, navy or marine hospital services in the discharge of their official duties, or to any person who ministers to or treats the sick or suffering by mental or spiritual means, without the use of any drug or material remedy."

Section 9 denounces a penalty against "any person practicing medicine or surgery or treating human ailments in the State without a certificate issued by this board in compliance with the provisions of this act," etc., to be recovered in an action of debt in the name of the State Board of Health, and with the proviso "that this section shall not apply to physicians who hold unrevoked certificates from the State Board of Health, issued prior to the time of the taking effect of this act."

On the trial in the Circuit Court the plaintiff produced four witnesses, who testified that the defendant had an office in the city of Rockford, on which was the sign, "Dr. Gordon, Healer," or "Magnetic Healer"; that he consulted with the witnesses as

to the nature of their ailments, and treated them. M. M. Carpenter stated: "I went to his place of business prior to March 21, 1900; went to talk to the doctor; he has two rooms; saw chairs and tables and carpets in his rooms; ordinary writing table in his waiting-room; was in his private room off his waiting-room, in which there was a kind of a lounge, table—a place where he lays a person; he told me to lay down, and I did so, and he gave me treatment; it was a massage treatment—rubbing; he rubbed the muscles of my arms and legs; my stomach bothered me; he rubbed me across there; he used no medicine or instruments whatever, and gave no directions as to diet." Mrs. Minnie Peterson testified: "I know Dr. Gordon and where his place of business is; I was at his office a year ago last June; I took twenty-six treatments; I commenced in June, and treated in July, and got through the last of July; I went into his waiting-room, and into his private room; he told me he could cure me; said he knew if I would let him he could help me, and he treated me; he made an examination, and said I was troubled with paralysis and nervousness; he rubbed me in treating me, and had me lay down; he manipulated on me fifteen to twenty or twenty-five minutes; he rubbed my body and bent my limbs; I believe he stated I should walk and use my limbs all I could, so that the blood would get to circulating a good deal; he charged me for his services. He claimed to me he could cure constipation." She also testified he used no instruments or medicines, externally or internally. The other two witnesses testified substantially to the same effect.

The defendant was sworn on his own behalf, and his testimony is here set out at length:

"My name is Joseph P. Gordon, resided in the city of Rockford since a year ago from the 1st of last April; I am the defendant in this proceeding; my place of business is in the Stewart Block, on South Main street, in this city; in my business of treating the sick I do not use any drugs, medicines or material remedies of any kind; I do not use any instruments, nor have I any instruments or drugs in my office; I never have prescribed any medicine or diet or given any prescription of any kind; my treatment and its theory is a magnetic treatment applied to the nervous system, principally, and I work on

the muscles to restore the action of the nerves; it is a mental science.

"Q. Do you use what is generally termed 'mental suggestion'? (Objection by counsel for plaintiff; overruled, and exception saved by counsel for plaintiff.)

"A. Yes, sir; it is merely a suggestion to the person, like this: When a person comes in with a disease that they have been told is incurable, we don't go on with that; we give them a mental suggestion to the effect that their case is not incurable; my theory is to get strength and to restore the nerves—to build up the nerve force; like that lady that came in here last Friday, she had paralysis; I told her she had nervous trouble; I treated her to restore the nerve force; she was weak mentally; doctors had told her her case was paralysis; I told her it was nervous trouble, which paralysis is; I gave the boy who referred to paying five dollars for seven treatments a half dozen treatments; he stopped the treatment before I wanted him to."

Cross-examination: "I never attempted to get a license from the State Board of Health; I might have told this boy he would have to receive a certain number of treatments; I operated first in the instance of disease like the case of a gentleman who has testified here, caused by obstructions of the nerve somewhere; I removed the cause, working the muscles, freeing the nerve force, and that makes the cure; first, I examine them to locate the cause of the disease; before I attempt to make a cure I must know the cause; I first make a diagnosis, then I remove the cause for that condition by working and freeing the nerve force; I could show you better how I do it; it is something a little hard to explain; I get as near to the muscles as I can; if a person is fleshy, it takes more force; I use nothing but the hands; if a person has no hands, he couldn't make a success of magnetic healing; I distinguish between two different diseases by the nerves; every nerve controls certain functions, and when we locate that nerve we know what is the matter with the patient; I do it by locating the nerve that is obstructed; a patient that had heart trouble and one who had paralysis require the same treatment; when paralysis is located, we try through the nerve force to remove the cause; the obstruction is between the paralyzed limb and the brain along the nerve; we treat the nerve to remove the cause; in paralysis, the lesion is between the paralyzed part—

is between that part and the brain; in the case of Carpenter, who has testified, my hand came in contact with his body at the point of the—between the—of the splastic nerve between these lower ribs—between the second and first lumbar—where the splastic nerve goes to the plexus; Mr. Carpenter's trouble was located at that point—in the solar plexus, back of the stomach; I located his trouble by examination—going over, looking for the trouble—the contracted condition of the nerve that supplies these points. I locate diseases by examinations; I don't ask questions necessarily; if it was a case of heart trouble, or if the person says the trouble was in the feet—cold feet—I know the cause of the trouble is further up; I can tell by making an examination—by finding the contracted condition of the nerves; I can tell without any questions at all; I do that by examination—by finding the contraction of the nerves; all treatment is done with the hands; a person has to have a good sense of touch; in the case of mental suggestion, I suggest to them that their case is not as they suppose; besides the suggestion that a case is not as bad as is supposed, we operate or manipulate on the body; we work with our hands to remove the cause; I am not a graduate of a medical school; I understand nothing about medicine; I practiced this sort of healing a few months in Louisiana and Missouri before I came to Rockford as a doctor; before coming here I graduated from a school of magnetic healing at Bloomington, Illinois.

“Q. You graduate doctors right here, do you not?”

“A. Yes, sir; I teach school; we never prescribe the number of treatments necessary. They ask me how many treatments; I tell them that two fellows will come to me with the same disease, and I cure one while I am starting with the other; after I have determined upon their case, I tell them to come every day or every other day.”

E. D. Reynolds and Warwick A. Shaw, for appellant.

R. K. Welsh, for the appellee.

MR. CHIEF JUSTICE WILKIN delivered the opinion of the court:

In our view, the only question for decision here is, did the evidence offered upon the trial fairly tend to prove the defendant guilty, within the proper construction of the act?

It is contended by counsel for appellee that section 7 is unconstitutional because the title is not broad enough to include it, and that the act is liable to the objection that it confers special privileges upon certain classes. In answer to these contentions, we only deem it necessary to cite the cases of *Williams v. People*, 121 Ill. 84, 11 N. E. 881, and *People v. Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923, in which these and other objections to the constitutionality of the law are fully discussed and the act sustained. It is true, these decisions were rendered under the acts of July 1, 1877, and July 1, 1887; but neither of them is materially different from the present law, so far as the objections here made are concerned. It is clear, we think, from the several sections of this statute, that the State Board of Health is authorized to divide those who desire to practice medicine in this State into two classes, that is, those who desire to practice medicine and surgery in all their branches, and those who desire to practice any other system or science of treating human ailments without the use of medicine or instruments. Section 7 defines what shall be regarded as practicing physicians, within the meaning of the act, as including both classes, and we are at a loss to perceive how it can be said that the defendant's own testimony does not tend to show that he did treat and operate on patients for physical ailments within the meaning of that section. It is true, he says his treatment was a mental science; but that statement is completely refuted by his testimony as to what he did, and we think his evidence, as well as that of the witnesses sworn on behalf of the People, at least fairly tended to prove, if it did not fully establish, that he did not use magnetic treatment, as commonly understood. He said: "I first make a diagnosis, then I remove the cause for that condition by working and freeing the nerve force. * * * I get as near the muscles as I can; if a person is fleshy, it takes more force." He also flexed, or, as one witness says, bent, the limbs. In short, all the testimony tends to show that he practiced what is known as osteopathy—at least, the treatment was of that nature.

It is insisted by appellee that the act does not include persons who do not use drugs, medicines, or instruments, and in support of this position he cites *Smith v. Lane*, 24 Hun. 632; *State v. Liffing*, 61 Oh. St. 39, 55 N. E. 168, 46 L. R. A.

334; *Nelson v. State Board of Health*, 108 Ky. 769, 57 S. W. 501, 50 L. R. A. 383; *State v. Mylod*, 20 R. I. 632, 40 Atl. 753, 41 L. R. A. 428, 11 Amer. Crim. Rep. 238. We have carefully examined these cases, and find that neither of them sustains the contention. The question decided in each of those cases was, whether persons giving treatment, as the defendant did in this case, as osteopaths and as Christian scientists were prohibited by the statutes of those States from administering to the sick and suffering, and it was held they were not. In other words, those decisions simply construe the statutes of their own States, none of which undertake, as does our act, to define the practice of medicine as including all "who shall treat or profess to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another," and none of the statutes construed in those cases undertook to classify physicians, as our statute does. It is true, the court said in the *Nelson Case*, speaking of the defendant as an osteopath: "Appellant is in no proper sense a physician or surgeon. He does not practice medicine. He is rather on the plane of a trained nurse. If by kneading and manipulating the body he can give relief from suffering, we see no reason why he should not be paid for his labor, as other laborers. Services in kneading and manipulating the body are no more the practice of medicine than services in bathing a patient to allay his fever or the inflammation of a wound. Appellant may not prescribe or administer medicine or perform surgery, but so long as he confines himself to osteopathy, kneading and manipulating the body without the use of medicine or surgical appliances, he violates no law, and appellee should not molest him."

We hardly think the large school of osteopaths, and those who believe in their method and system of treatment, would be willing to concede that such treatment is no more than that which a trained nurse might administer. While it may be truthfully said that it is not the practice of medicine in the common acceptance of that term, it cannot be claimed that it does not "profess to treat, operate on or prescribe for any physical ailment or any physical injury to or deformity of another," and certainly it cannot be insisted that such persons do not practice another "system or science of treating human ailments without the use of medicine internally or

externally." Section 17 of the statute of Nebraska regulating the practice of medicine and surgery in that State provides: "Any person shall be regarded as practicing medicine, within the meaning of this act, who shall operate on, profess to heal or prescribe for or otherwise treat any physical or mental ailment of another," etc.; and the Supreme Court of that State held in *State v. Buswell*, 58 N. W. 728, 24 L. R. A. 68, that the practice of treating patients for ailments by what is known as "Christian Science" was a violation of that section.

But it is contended that the defendant in this case is shown by the testimony to be exempt from the operation of the statute by the last clause of the proviso to section 7, that is, that he is a person "who ministers to or treats the sick or suffering by mental or spiritual means, without the use of any drug or material remedy." We are unable to see how, under his own evidence, this position can be maintained. It is true, he does not use "drugs or other material remedy;" neither does he treat the "sick or suffering by *mental or spiritual means*," and therefore whether the word "material" is to be construed as meaning other treatment similar to the use of drugs is wholly immaterial. Very clearly this provision means that those who pretend to relieve the ailments of others by mere mental or spiritual means shall not be considered within the act; but if the defendant, under the proof in this case, can bring himself within that exception, then every one who treats diseases without administering medicine, either externally or internally, can also be brought within the exception. Few, perhaps, if any, physicians attempt to treat the sick and suffering without appealing to the mental faculties, to a greater or less degree, in aid of the remedies they apply or prescribe; but that is not treating the sick by mental or spiritual means.

We all agree that the objects and purposes of this and similar statutes are to protect the sick and suffering, and the community at large, against the ignorant and unlearned, who hold themselves out as being possessed of peculiar skill in the treatment of disease—from holding themselves out to the world as physicians and surgeons without having acquired any knowledge whatever of the human system or the diseases and ailments to which it is subject. Without some knowledge of the location and offices of the various nerves, muscles, and joints, the manipulation of those parts and the flexing of the

limbs cannot be intelligently, if, indeed, safely, practiced. Merely giving massage treatment or bathing a patient is very different from advertising one's business or calling to be that of a doctor or physician, and, as such, administering osteopathic treatment. The one properly falls within the profession of a trained nurse, while the other does not.

We think the Circuit Court erred in instructing the jury to find for the defendant, and that the Appellate Court erred in affirming that judgment.

Reversed and remanded.

LITTLE v. STATE.

60 Neb. 749—51 L. R. A. 717, 84 N. W. Rep. 248.

Decided November 21, 1900.

OSTEOPATHY: *Practice of medicine—Title of act—Pleading and practice.*

1. One who, without complying with the statute establishing a State Board of Health and prohibiting the practice of "medicine, surgery and obstetrics" without a license, practices medicine, is liable to the penalty prescribed by such. *State v. Buswell*, 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68.
2. In construing statutes effect should be given to the intention of the legislature.
3. One who practices what is known as osteopathy without obtaining a certificate from the State Board of Health is a practitioner of medicine as defined by article 1, chapter 55, Compiled Statutes, and is liable to the penalty prescribed specifically for practicing medicine without a license.
4. Section 17, article 1, chapter 55, Compiled Statutes is within the purview of the title of the act.
5. "Surgery and obstetrics," as those terms are popularly understood, are embraced in the title of an act to regulate the practice of medicine.
6. The statute is not prohibitive in its effect, but attempts to regulate the practice of the art of healing.
7. Several misdemeanors of the same kind may be set forth in as many counts of an information, and the prosecutor is not required to elect upon which count he will proceed.
(Syllabus by the Court.)

Supreme Court of Nebraska.

Error to the District Court of Lancaster County; Holmes, Judge.

Charles W. Little, convicted of practicing medicine without a license, appeals. Affirmed.

Abbott, Selleck & Lane, for the plaintiff in error.

Constantine J. Smyth, Attorney General, *Paul Pizey*, Assistant and *T. C. Munger*, contra.

NORVAL, C. J. Charles W. Little comes on error from the District Court of Lancaster County, he having been there convicted of practicing medicine without having procured a license, as required by Article 1, chapter 55, Compiled Statutes. He is what is known as a practitioner of osteopathy, the practice of which consists principally in rubbing, pulling, and kneading with the hands and fingers certain portions of the bodies, and flexing and manipulating the limbs, of those afflicted with disease, the object of such treatment being to remove the cause or causes of trouble. He urges a number of errors, the principal contention, however, being that his occupation does not fall within the definition of a practitioner of medicine as found in section 17 of the said article. This court, however, is of the opinion that those who practice osteopathy for compensation come within the purview of the statute as clearly as those who practice what is known as "Christian Science," and therefore this case falls within the principle of *State v. Buswell*, 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68. With the rule announced in that case we are fully satisfied, although it is possible that the decisions of some other courts are in conflict with it. The doctrine declared in that case will carry out the legislative intent, and effect the object of the statute, which is "to protect the afflicted from the pretensions of the ignorant and avaricious," no matter whether the persons pretending to heal bodily or mental ailments do or do not profess to "follow beaten paths and established usages." In construing statutes, effect should be given to the intention of the legislature. It is argued that osteopaths do not profess to treat any physical or mental ailment, but that they merely seek to remove the cause of such ailment or disease, and therefore do not come within the definition mentioned. The writer

is not deeply versed in the theory of the healing art, but he apprehends that all physicians have the same object in view, namely, the restoring of the patient to sound bodily or mental condition, and, whether they profess to attack the malady or its cause, they are treating the ailment, as the word is popularly understood. We can therefore see no good reason why the practice of osteopathy does not fall within the provisions of the statutes under which defendant was prosecuted, as clearly so as do ordinary practitioners, or those who profess to heal by what is known as "Christian Science" *Eastman v. People*, 71 Ill. App. 236.

Some technical objections it will be necessary to notice before finally disposing of the case. It is urged that no penalty is imposed for the alleged offense, it being claimed that, after the section defining the offense was amended so as to include a wider scope of offenses, the one for which he was prosecuted was included among those injected into the section by the amendment. And it is claimed that, as the section imposing the penalty was not re-enacted at the same time the other section was amended, the penalty can apply only to those offenses included in the amended section as originally enacted. The objection is perhaps ingenious, but untenable. Had the legislature intended that no penalty should attach to the new classes of offenses denounced in the section as amended, it is more reasonable to suppose that it would have amended the section denouncing the penalty so as to leave no room for doubt that no penalty was intended, rather than that it should leave the latter unchanged. The fact that it was left in its original condition seems to furnish indubitable proof that the legislature was satisfied with this section, and that it was intended to include and define the proper punishment for all offenses defined in the amended section.

Another objection is that the definition included in section 17 is wider than the title of the act, the title being, among other things, "to regulate the practice of medicine;" and, further, that the act attempts to regulate not only the practice of medicine, but also the practice of surgery and obstetrics. We have no doubt that the legislature had the power to define what acts would constitute the practice of medicine, which it had done in section 17. Further, as popularly understood, surgery and obstetrics are each a part of the

healing art—the art of medicine. In this country, as a rule, the surgeon, physician, and obstetrician are usually comprised in one and the same person, and he who practices these arts combined is popularly considered as practicing medicine, no matter which one of the three arts he may at any one time be utilizing. The objection is untenable.

It is insisted that the statute under consideration is void, because it is prohibitive in its scope and effect. The construction of the act which counsel places upon it we are unwilling to adopt. The statute undertakes to regulate, and it is not prohibitive in its nature. Any one who has complied with the provisions may practice medicine in this State. It is prohibitive only as to those who have not been duly licensed by the State Board of Health to practice the art of healing.

The information contained sixteen counts, each charging a misdemeanor in violating the statute in question. It is claimed the court erred in not requiring the county attorney to elect upon which count he would proceed. The ruling was proper, as the offenses charged were of a similar kind. *Hans v. State*, 50 Neb. 150, 69 N. W. 838; *Hurlburt v. State*, 52 Neb. 428, 72 N. W. 471.

A number of objections are urged in the brief of defendant, all of which have had due consideration, and we have failed to discover that any reversible error has been pointed out by his counsel.

The verdict is supported by ample evidence. The judgment is

Affirmed.

TERRITORY V. RICHARDSON.

9 Okla. 579—49 L. R. A. 440—60 Pac. Rep. 244

Decided January Term, 1900.

PARDON: *Governor's unqualified authority to grant, either before or after conviction—Practice as to pleading and pardon—Collateral attack.*

1. A pardon is an act of grace, proceeding from the powers intrusted with the execution of the laws, which exempts the individual upon whom it is bestowed from the punishment which the law

inflicts for the commission of a crime. It is a remission of guilt, and a declaration of record by the authorized authority that a particular individual is to be relieved from the legal consequences of a particular crime.

2. The power and authority to grant pardons for offenses against the laws of this Territory is by the organic act committed to the Governor, and is complete in him. The power to grant pardons is exclusive of the judicial and legislative authority. It is conferred by the United States, and it cannot be lessened by any act of the territorial legislature. When a full and absolute pardon is granted to one by the Governor of this Territory, it exempts the individual upon whom it is bestowed from the punishment which the law inflicts upon the crime which he has committed, and the crime is forgiven and remitted.
3. A pardon extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.
4. After a pardon has been granted, it is thenceforward and at all times final, notwithstanding the fact that it may not have been granted in pursuance of the regulations provided for in the statutes of the Territory.
5. The territorial legislature has no power to impose limitations upon the manner in which the pardoning power shall be used, set up, alleged or called to the notice of the court as a defense. All that is requisite is that the attention of the court shall be called judicially to the fact that a full and absolute pardon has been granted, and the court before whom the matter is pending will itself determine whether the evidence is sufficient; and when, as in this case, there is no contention on the subject, but the pardon is admitted, it is the duty of the court to discharge the defendant, and dismiss the proceeding against him.
6. In order to impeach a pardon for fraud, it must be done in a direct, and not in a collateral, manner, such as the present proceeding.
7. The fact that a pardon has been granted is available as a protection from any further proceeding in respect to the crime for which the pardon has been extended, at any time or stage of the proceedings before the execution of the sentence.

(Syllabus by the Court.)

Supreme Court of Oklahoma.

Error to the District Court, Kay County; Before Hon. Bayard T. Hainer, Judge.

T. M. Richardson, Jr., was discharged from an indictment because of a pardon granted. The Territory excepts and brings error. Affirmed.

On December 16, 1897, the defendant in error was charged

by indictment with the offense of receiving a deposit in the First State Bank of Perry, when he knew the bank to be insolvent, and when he was at the time assistant cashier thereof. A demurrer filed by the defendant was overruled, and the plea of not guilty entered.

Thereafter, upon the application of the defendant, a change of venue was granted from Noble to Kay County; consent was given by the defendant to the setting of the case for trial, and an application made for an order for witnesses to be subpoenaed in his behalf. When the case was called for trial, the defendant, without leave of court and without withdrawing his plea of not guilty, filed a motion to dismiss the indictment, on the ground that a pardon had been granted to him on March 30, 1897, by the Secretary of the Territory, then properly acting as Governor, in the absence of the Governor himself.

Thereafter, on the 28th day of September, 1898, the defendant, by leave of court, filed an amended motion, entitling it "in the nature of a plea in abatement, setting up a pardon," in which he set forth more fully that a free, full, absolute and unconditional pardon had been granted to the defendant upon the date referred to, and made profert of the letters patent by which the pardon had been granted, and in which the offense as charged in the indictment was set forth, and for which the pardon recited that it "granted unto the said T. M. Richardson, Jr., a full, complete and absolute pardon for all offenses committed or charged against him, growing out of the management or control of the First State Bank of Perry, between the 11th day of June, 1895, and the 16th day of September, 1895, of which he now stands indicted, or for which he may hereafter be indicted, of any and every nature whatsoever, and hereby remitting and releasing unto the said T. M. Richardson, Jr., all penalties incurred or supposed to be incurred for or on account of the management or control of said bank as aforesaid." The pardon was executed by the acting Governor, under the great seal of the Territory.

Upon the hearing of the motion, the plaintiff, by its attorneys, objected to its consideration, for the reasons (1) that the defendant had waived the benefits of the pardon by pleading to the merits, and by taking a change of venue and causing the case to be set for trial and (2) that the motion was in the nature of a special plea, with the general issue before the

court, and that the matter set up therein should be tried with the general issue; and (3) that the pardon was not in fact accepted, and had been procured by fraud and misrepresentation, and without compliance with the laws of the Territory with reference to the granting of the same; and (4) that the order should be tried with the general issue, and an opportunity given the plaintiff to show that the Attorney General of the Territory had acted on behalf of the defendant in procuring the pardon, and had procured the same by misrepresentation and a concealment of facts.

Time was given to the plaintiff to file affidavits to substantiate the statement of facts made in objection to the consideration of the motion to the 4th day of October following, and upon the hearing of the motion, the court having directed the plaintiff to "substantiate the charges made in court against the Secretary of the Territory, acting as Governor," the counsel for the Territory stated that, for the purposes of that motion, he did not wish to be understood as making any charges, or being able to prove any charges.

In passing upon the motion, the court sustained the plea of pardon upon the ground that the pardon upon its face showed that it was duly and regularly issued, and had been duly accepted by the defendant. The action was dismissed, and the defendant discharged. The Territory objected to the proceeding, and exceptions were reserved.

Harper S. Cunningham, Attorney General, *A. R. Museller*, County Attorney, and *S. H. Harris*, for the Territory.

H. H. Howard, *J. L. Pancoast*, and *James B. Diggs*, for the defendant in error.

Opinion of the Court by McATTEE, J. (after stating the facts). It is contended by the plaintiff in error that the court had no authority to entertain the plea in abatement, because any special plea had been waived by the act of the defendant in pleading not guilty, taking a change of venue, and consenting that the case be set for trial.

In support of this contention, the plaintiff in error cites the various sections of the statute which provide for the pleas on behalf of the defendant, and by which the defense of the defendant may be set up, and upon which the indictment must be set aside, if at all, by the court.

Sections 5117, 5118, 5127 and 5133 provide that the only pleading on the part of the defendant is either a demurrer or a plea; that the demurrer and the plea must be put in open court, either at the time of the arraignment or at such other time as may be allowed to the defendant for that purpose; that there are three kinds of pleas to an indictment, to-wit: (1) guilty, (2) not guilty, and (3) a former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the plea of not guilty; and that all matters of fact tending to establish a defense other than specified in the third subdivision of section 5127 may be given in evidence under the plea of not guilty.

It is contended by the plaintiff in error that the court should not have sustained the motion of the defendant in error to dismiss the cause, since the statute adequately provides for giving in evidence the pardon under the plea of not guilty, and that the motion of the defendant is not provided for in or by the provisions of the statute here enumerated, and is therefore excluded from use in our procedure.

The organic act provides, by section 2, that

"The Governor * * * may grant pardons for offenses against the laws of said Territory, and reprieves for offenses against the laws of the United States until the decision of the President can be known thereon."

A pardon is an act of grace, proceeding from the powers intrusted with the execution of the laws, which exempts the individual upon whom it is bestowed from the punishment which the law inflicts for the commission of a crime.

This is the definition of pardon as given by Chief Justice Marshall in *U. S. v. Wilson*, 7 Peters 150 (8 L. ed. 640), and it has been followed since that time. (*Ex parte Wells*, 18 How. 307, 15 L. ed. 421; *People v. Bowen*, 43 Cal. 439.)

The effect of a pardon is included in definitions made by other legal writers, the standard authorities, whom we follow. Lord Coke defines a pardon as a "work of mercy, whereby the king, either before or after attainder, sentence, or conviction, forgiveth any offense, punishment, execution. * * *" 3 Inst. 233.

And Bishop says that "pardon is a remission of guilt." (1 Bish. Cr. Law, § 898.)

And a pardon is defined in Whart. Cr. Law, § 591, as a

declaration of record by a sovereign that a particular individual is to be relieved from the legal consequences of a particular crime. (17 Am. & Eng. Enc. Law, 317.)

The power and authority to grant pardons for offenses against the laws of the Territory is by the organic act committed to the Governor. It is complete in him. It is so provided by the organic act. The power to grant pardons is exclusive of the judicial and legislative authority. It is conferred by the United States, and it cannot be lessened by any act of the territorial legislature. Under the grant in the organic act and the definitions herein recited, when a full and absolute pardon is granted to one by the Governor of this Territory, it exempts the individual on whom it is bestowed from the punishment which the law inflicts upon the crime which he has committed. The crime is forgiven and remitted, and the individual is relieved from all of its legal consequences.

If, after the granting of this authority and jurisdiction to the Governor by Congress, it still remained in the power of the territorial legislature to prescribe the provisions under which the Governor must proceed, it would result that the legislature would have the power to lessen the facility and freedom with which the pardon might be granted. The existence of such a power in the legislature is repugnant to the absolute authority in this matter given to the Governor by the organic act, by which the pardoning power is completely and wholly vested in him. And it has never been understood, in any of the Territories, that the territorial legislature had any authority to prescribe limitations, or to determine in what manner the individual seeking the pardon must proceed in order to be entitled to this act of mercy.

The executive authority has not been in any wise controlled by any act of the Legislature with reference to this subject, which could be understood as in any manner limiting the authority and discretion of the Governor, when he saw fit to exercise it, except as the legislative provisions may have been considered as a regulation of the method of procedure by persons seeking to bring their application for the benefits of the pardoning power before the Governor in such a way as to entitle them to be heard.

The power to grant pardons, by the Constitution of the United States, section 2, art. 2, providing that the "President

* * * shall have power to grant reprieves and pardons against the laws of the United States, except in case of impeachment," is in terms of identical scope and force, within the United States, with the provisions of our organic act, which provides that "the Governor * * * may grant pardons for offenses against the laws of said Territory." And the reasoning in *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366, is entirely applicable here. The court there say that, inasmuch as the Constitution provides that the President shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment, that the power thus conferred is unlimited; extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment, and that this power of the President is not subject to legislative control, and that Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy imposed in him cannot be fettered by any legislative restrictions.

The same reasoning is adopted in the Territories with reference to the pardoning power of the Governor.

It was so held in *Re Moore*, 31 Pac. 980, in *State v. Jenkins*, 54 Pac. 765, in 85 Mo. 547, 27 Atl. 463, in *Diehl v. Rodgers*, 169 Pa. St. 316, 32 Atl. 424, and in *Ex parte Reno*, 66 Mo. 266.

The sum of these decisions is that the power to grant pardons is exclusive, and cannot be exercised or controlled by the legislature.

A part of the contention of the plaintiff in error is that the pardon was not procured in pursuance of the regulations therefor, as prescribed in the statutes of 1893; but it will be seen by the authorities here cited, that since it is admitted that the pardon was granted as averred, and that it was full and absolute, that thenceforward it was final, notwithstanding the fact that it may not have been granted in pursuance of the regulations provided for in the statutes of the Territory.

It also follows, from the absolute, unlimited, and final character of the Governor's act in granting the pardon, and from his complete and exclusive jurisdiction in the matter, that the territorial legislature has no power to impose limitations upon

the manner in which it shall be used, set up, alleged, or called to the notice of the court as a defense.

All that is requisite is that the attention of the court shall be called to the fact that a full and absolute pardon has been granted, and the court before whom the matter is pending will itself determine whether the evidence is sufficient; and when, as in this case, there is no contention on the subject, but the pardon is admitted, it is the duty of the court to discharge the defendant, and dismiss the proceeding against him, since the pardon is itself an absolute exemption from any further legal proceedings which could tend to harass the defendant on account of the crime, or alleged crime, which has been the subject of executive clemency in the exercise of the pardoning power.

It was said in Blackstone that: "The king's charter of pardon must be specifically pleaded, and that at a proper time; for, if a man is indicted, and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon." But Blackstone himself added, immediately thereafter, that: "if a man avails himself thereof, as by course of law he may, a pardon may either be pleaded on arraignment, or in arrest of judgment, or, in the present stage of proceedings, in bar of execution." (4 Bl. Comm. p. 401).

And, after making this citation from Blackstone, in the *U. S. v. Wilson*, 7 Peters 150, 8 L. ed. 640, Chief Justice Marshall adds that the court, in a case in which the defendant did not avail himself at all of the pardon, says that the matter of pardon, when its benefits are sought, "must be in some manner brought judicially before the court, by plea, motion or otherwise." And he adds: "A court would undoubtedly, at this day, permit a pardon to be used after the general issue. Still, where the benefit is to be obtained through the agency of the court, it must be brought regularly to the notice of that tribunal," and that "a person may avail himself of a pardon by showing it to the court, even after waiving it by pleading the general issue."

Any other construction would lead to useless and unwarranted delay and expense. When a pardon is shown and admitted, the defendant is entitled to complete exemption from further annoyance; and, if the trial court had held otherwise,

and had undertaken to further detain the defendant, and impanel a jury upon the general issue, the only result which could have followed would have been that, upon the introduction of the pardon in evidence, and its examination by the court, and its character ascertained as a full and absolute pardon for the offense in question, then the court should have forthwith discharged the defendant and the jury.

But it is contended by the plaintiff that he would have had a right to attack the pardon for fraud, or to show that it was not accepted. Upon the latter half of the proposition, it is sufficient that the defendant brought the pardon to the notice of the court in his motion to dismiss; and upon the former proposition it must be held that, in order to impeach for fraud, it must be done in a direct proceeding, and not in a collateral proceeding like this. It has been held, concerning pardons, that they stand upon the same plane with the Government's patent for land, with its patent for an invention, or with its incorporation of a company, or with the record of a judgment; that, while fraud may vitiate them, and an action may be brought setting either the deed, patent, incorporation, or judgment aside for fraud, it will only be done in a direct proceeding for that purpose.

And it has been said that "a pardon is granted to one who is certainly guilty, sometimes before, but usually after, conviction; and the court takes no notice of it unless pleaded, or in some way claimed by the person pardoned; and it is usually granted by the crown or by the executive." (*State v. Blalock*, 61 N. C. 242.)

In *Rex v. Haines*, 1 Wils. 214, where a pardon granted after issue joined, but before conviction, was not called to the attention of the court until after conviction, it was nevertheless held to be in time, but the defendant was charged with full payment of costs.

The plea of pardon may be made after conviction, in response to the question whether the accused has anything to say why sentence should not be pronounced. (*Blair v. Com.* 25 Grat. Va. 850.)

A pardon may properly be called to the attention of the Appellate Court where the case is pending on appeal. (*Com. v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699.)

And this may be done by suggestion of the State's Attorney

that the defendant has been pardoned, upon which the appeal will be dismissed. (*State v. White*, 26 Or. 605, 40 Pac. 229.)

The Governor having been vested with the pardoning power, and with exclusive authority to hear and determine, and no limitation being imposed upon him, that this benign prerogative of mercy shall not be so treated, and that the suggestion that it may be set aside by a court in a collateral proceeding like this is not to be thought of for a moment. (*Knapp v. Thomas*, 39 Ohio St. 377.)

The appeal will therefore be dismissed, and the judgment of the trial court affirmed.

HAINER, J., who presided in the court below, not sitting; all of the other justices concurring.

ROBERTS v. STATE.

160 N. Y. 217—54 N. E. Rep. 678.

Decided October 3, 1899.

PARDON—SPECIAL ACT OF THE NEW YORK LEGISLATURE TO ALLOW COMPENSATION AND DAMAGES TO A PARDONED CONVICT, CONSTRUED: A *pardon is a matter of grace and not of acquittal—Burden on the ex-convict to prove his innocence.*

1. A pardon is granted as a matter of grace on the theory that the person pardoned is guilty. It effects a release from all of the unenforced penalty; "but has no operation upon the portion of the sentence already executed." * * * "What the party convicted has already endured or paid, the pardon does not restore."
2. The General Assembly of New York enacted, that:—"John Roberts is hereby authorized to present a claim to the Board of Claims for the damages sustained by him by reason of his improper conviction and imprisonment for the alleged crime of burglary, and the Board of Claims is hereby authorized to hear and pass upon said claim and to award such compensation for the damages sustained by said John Roberts in consequence of such conviction and imprisonment as shall appear to be reasonable and just."

Held—That under this act, Roberts was not entitled to recover, unless he proved that this conviction was improper.

(Note criticising the above, follows the opinion.)

New York Court of Appeals.

Appeal from a judgment of the Appellate Division of the Supreme Court in the Third Judicial Department, entered May 4, 1898 (51 N. Y. S. 691, 30 App. Div. 106), reversing a judgment of the Court of Claims. Affirmed.

Under a special statute, John Roberts filed a claim against the State of New York to recover compensation and damages arising from his improper conviction and imprisonment for an alleged burglary. The amount of the claim as presented was \$138,976.54.

Upon the 15th day of April, 1895, which was more than eighteen years after his conviction, and nearly seventeen years after his pardon, his rights as a citizen were restored to him by the Governor of the State. Two days later the legislature passed a statute, as follows:

"An Act to authorize the Board of Claims to hear, audit and determine the claim of John Roberts. Became a law April 17, 1895, with the approval of the Governor.

Passed, three-fifths being present.

"The People of the State of New York, represented in Senate and Assembly, do enact, as follows:

"Section 1. John Roberts is hereby authorized to present a claim to the Board of Claims for the damages sustained by him by reason of his improper conviction and imprisonment for the alleged crime of burglary, and the Board of Claims is hereby authorized to hear and pass upon said claim and to award such compensation for the damages sustained by said John Roberts in consequence of such conviction and imprisonment as shall appear to be just and reasonable.

"Sec. 2. Either party may take an appeal to the Court of Appeals from any award made under authority of this act, if the amount in controversy exceeds five hundred dollars, provided such appeal be taken by service of a notice of appeal within thirty days after service of a copy of the award.

"Sec. 3. This act shall take effect immediately." Laws 1895, c. 342.

In May, 1895, the appellant presented a claim to the board of claims for the amount already mentioned, which was composed of items for loss of business, loss of property, counsel fees and other expenses, \$33,538.10 for interest, and for damages to reputation, etc., \$75,000.

Joseph P. McDonough, for the appellant.

John C. Davies, Attorney General and *John H. Coyne*, for the State.

MARTIN, J. It is manifest that the appellant's pardon and restoration to the rights of citizenship had no retroactive effect upon the judgment of conviction, which remains unreversed and has not been set aside. We think the effect of a pardon is to relieve the offender of all unenforced penalties annexed to the conviction, but what the party convicted has already endured or paid the pardon does not restore. When it takes effect it puts an end to any further infliction of punishment; but has no operation upon the portion of the sentence already executed. A pardon proceeds, not upon the theory of innocence, but implies guilt. If there was no guilt, theoretically at least, there would be no basis for pardon. It is granted, not as a matter of right, but of grace. In the language of another: "A party is acquitted on the ground of innocence. He is pardoned through favor." The pardon in this case shows upon its face that it was granted as an act of mercy, and not as one of justice. It was upon the representation that the appellant was a fit subject for mercy that it was obtained, and not upon the ground that the judgment was unjust or invalid. If the judgment was erroneous, the remedy was by appeal or by application to set it aside, and not by pardon. That question was for the judicial branch of the State government to determine, and not for the legislative or executive department. Upon this branch of the case we concur in the conclusion reached by the learned Appellate Division, which has so carefully considered the question that no further discussion seems necessary.

Assuming, as we must, that the appellant's pardon and restoration to citizenship, affected the judgment of conviction only to relieve him from future or further punishment, it follows that the imprisonment for which he seeks to recover damages was in all respects proper. The judgment of conviction was introduced in evidence before the Court of Claims, so that the record of the trial in this action contains a judgment adjudging the appellant guilty of the crime with which he was charged, and for which he was convicted and imprisoned. Thus, it was conclusively established that he was guilty of the offense charged, and that his punishment was legal. Under these cir-

cumstances, it is obvious that he was not entitled to recover, unless that right is expressly conferred by the statute of 1895, or is to be clearly and necessarily implied from its provisions.

This brings us to a consideration of the provisions of that act. By it the appellant was authorized to present a claim to the Board of Claims for damages sustained by reason of his conviction and imprisonment. The board was then authorized to hear and pass upon the claim, and award such compensation as should appear to be just and reasonable.

The evident purpose of this statute was threefold: (1) To permit the appellant to present to the Board of Claims any claim he had or supposed he had against the State for damages sustained by reason of his conviction and imprisonment for the crime of burglary; (2) when a claim was presented, to authorize the board to pass upon it and determine whether it was valid or invalid; and (3) if found valid, to allow it to determine what just and reasonable compensation he should receive for the damages he had sustained by reason thereof.

Thus, if a claim was presented, the statute contemplated a trial before the board of two questions. The primary and fundamental one was whether the claim was proper and valid, which included the propriety or impropriety of the appellant's conviction and imprisonment. The other related to the amount of damages, and became important only after the board determined that the appellant's imprisonment was improper, and the claim presented by him valid. The solution of these questions was dependent upon the proof adduced upon the trial.

Obviously it was not the intention of the legislature to itself pass upon the question whether the appellant's conviction was proper or otherwise, but to submit that question, together with the question of damages, to the board for its consideration and determination. With this conclusion the appellant's attorney seems to be at least in partial accord, for he states in his brief that "the use of the word 'improper' is merely descriptive of the legislature's opinion. It is at most harmless. If it were omitted, the act would still authorize an award to the claimant upon proof of damages." If the appellant was not improperly convicted and imprisoned, then he had no valid claim, and it was the duty of the board, under the statute, to dismiss the proceeding. It was therefore incumbent upon him to establish that he was improperly convicted and imprisoned, and the amount

of damages he had sustained by reason thereof. While a great volume of evidence was given upon the second question, we find nothing in the record which justified the board in finding that his conviction and imprisonment were improper. But, instead, the evidence upon which he was convicted and the judgment of conviction were introduced, both of which show that his conviction was proper; the former presumptively, and the latter conclusively. With this condition of the record, it is evident that the board of claims had no power or authority to award him any damages whatsoever.

The appellant, however, in his eighth point, contends that the liability of the State has been conceded by the legislature, and cites the case of *Cayuga Co. v. State*, 153 N. Y. 279, 47 N. E. 288, as sustaining that proposition. An examination of the case cited discloses that the question there under consideration was totally, unlike the question involved in this case. The question there was whether the County of Cayuga had been compelled to bear more than its proper share of taxation by the payment of taxes to defray certain expenses which should have been borne by the State. In that case it was held that the claim was not a private claim, within the purview of section 19 of article 3 of the Constitution, forbidding the Legislature to pay or audit any private claim against the State, but was a public one. If the contention of the appellant be correct, and the statute is subject to the construction claimed by him, its constitutionality may well be doubted. But we think it is entitled to no such construction, but should be given that already suggested.

That conclusion renders the determination of the various other interesting and important questions raised and discussed upon the argument and in the briefs of the respective counsel relating to the limitation of the plaintiff's right of action, the constitutionality of the act, or the adequacy or inadequacy of the award, wholly unnecessary. We think the conclusion reached by the Appellate Division was correct, and that the judgment appealed from should be affirmed, with costs.

All concur; (BARTLETT J., in result).

Judgment affirmed.

NOTES (By J. F. G.).—The above opinion is subject to grave doubts, both as to its theories and its conclusions.

A pardon is not always accompanied with a presumption of guilt—

A pardon may, in the polite language of royal courts, be termed an *act of grace*; and is often exercised purely as an instrument of mercy; but on many cases it is prompted, not by sentiments of mercy, but by the demands of justice. Take, for example, the case of the Boorns, who were convicted and sentenced for the supposed murder of their brother-in-law, Richard Colvin, who at the time was alive. Although the one was in the penitentiary and the other awaiting execution, the re-appearance of Colvin resulted in pardons, saving one from the gallows and the other from life imprisonment; certainly not as acts of mercy, but as matters of right,—*because there was no guilt*.

In England, from time immemorial, if, in the trial of a criminal case, the presiding judge entertained a serious doubt as to whether the facts conformed to the law, he was likely to permit the jury to return a verdict of guilty, and then *reserve* the case for the consideration of all the judges. If they found the law in favor of the accused, a pardon was recommended, and invariably granted by the Crown; not as a matter of mercy, but as a matter of right, to one not guilty under the law interpreted by the judges.

Misinterpretation of the act in question:—We cannot agree with the construction placed on the act by the court. The language used in the act is:—"John Roberts is hereby authorized to present a claim to the Board of Claims for the damages sustained by him by reason of his *improper* conviction and imprisonment for the *alleged* crime of burglary, and the Board of Claims is hereby authorized to hear and pass upon such claim and to award such compensation for the damages sustained by said John Roberts in consequence of such conviction and imprisonment as shall appear to be just and reasonable." Had the word "*alleged*" preceded the word "*improper*," there would be more force to the position taken by the court; for then it would have read: "By reason of his *alleged* improper conviction and imprisonment for the crime of *burglary*, and the question as to whether the conviction was proper or not, might have left a matter of proof; but, the legislature speaks plainly, declaring that the conviction of the *alleged* crime of burglary was improper. It is a reflection on the sense of the legislators to intimate that a pardon granted as a matter of mercy, would be considered a just basis for legislative action, granting to a burglar a right of action to recover damages for an imprisonment, or even to settle the question of guilt or innocence by attacking a conviction collaterally through a claim for damages—a right not possessed by all convicted of similar offenses.

STATE v. ROWELL.

72 Vt. 28 82 Am. St. Rep. 918—47 Atl. Rep. 111.

Decided November 6, 1899.

PERJURY: *False testimony in a voidable proceeding may be perjury—Distinction between that and testimony in a void proceeding—The indictment, vague, uncertain and insufficient.*

1. The defendant testified in a trial upon an indictment against himself, which trial resulted in a conviction. He was then indicted for perjury in his testimony at that trial; but subsequent to the finding of the latter indictment, and before trial thereon, the conviction on the former indictment was reversed because the indictment was insufficient. *Held*, that as the court had jurisdiction to hear and determine the matter charged in the first indictment, the proceeding being voidable, but not void, the second indictment would lie.
2. The indictment, after the introductory alleging as to jurisdiction, description of proceeding, taking of the oath, etc., charged, that the accused committed perjury, "by testifying in substance as follows," after which followed over six hundred questions thereto, several of the answers giving the name, and residence of the accused the same as charged in the indictment, and others being such as would not seem to be false; the indictment not specifically alleging which answers were false. *Held*,—that the indictment was vague, uncertain and insufficient.

Supreme Court of Vermont.

ISAAC H. P. ROWELL was indicted for perjury. He demurred to the indictment. A *pro forma* order overruling the demurrer was entered, and the case passed to the Supreme Court. Demurrer sustained and indictment quashed.

Argued before TAFT, C. J., and ROWELL, TYLER, MUNSON, START, THOMPSON, and WATSON, JJ.

Richard A. Hoar, State's Attorney, for the State.

Geo. W. Wing and *T. R. Gordon*, for the respondent.

TYLER, J. The respondent was indicted for perjury at the September term, 1896, Washington County Court. He filed a demurrer to the indictment, which was overruled, and he was ordered to plead over, without prejudice to the demurrer, and he thereupon pleaded not guilty, was tried by jury at the fol-

lowing March term, and convicted. Sentence was respited, and the cause was passed to the Supreme Court, and was heard at the January term, 1898, when the demurrer was sustained, and the indictment quashed.

The present indictment was found at the September term, 1897, while the former one was pending in the Supreme Court, and charges the respondent with perjury in testifying in the trial upon that indictment.

1. The first question is whether perjury can be committed in testifying in a trial upon an indictment which is finally adjudged insufficient.

"Perjury" is defined by Mr. Bishop as the willful giving under oath, in a judicial proceeding or court of justice, of false testimony material to the issue or point of inquiry. 2 Bish. New Cr. Law, § 1015.

The testimony in this case having been given in a judicial proceeding, the court having jurisdiction of the parties and of the subject-matter, and the testimony being material to the issue, the elements of the crime of perjury seem to be made out, if well alleged. The respondent, however, contends that, by reason of the insufficiency of the indictment, the trial was only a mistrial; that the proceeding was void; that the court had not jurisdiction of the subject-matter of the suit to render a judgment of which the respondent could avail himself in a subsequent prosecution for the same cause; that there was no issue to which the testimony was material.

It is true that in an extrajudicial proceeding, where an oath could not lawfully be administered, perjury by falsely testifying could not be committed. This was so held in *Rex v. Cohen*, 1 Starkie 516, cited in 1 Bish. New Cr. Law, § 440, note. There a statute provided that upon the death of a co-plaintiff the suit should abate unless the death was suggested upon the record, and a co-plaintiff dying after issue joined without such suggestion, a trial was extrajudicial, and perjury could not be assigned upon any false testimony given. And in *Com. v. White*, 8 Pick. 453, a justice of the peace tried and convicted a person for a certain misdemeanor under a statute that had been abrogated by a subsequent one, which gave jurisdiction to the Court of Common Pleas. Held, that the whole matter was *coram non judice*, that an oath could not lawfully be administered, and therefore the defendant could not have committed

perjury in testifying. Numerous cases of this kind might be cited, where the proceedings being void, it was held that perjury could not be assigned. In this case the indictment was regularly found. The trial court held it sufficient, and tried the respondent upon it; but this court held it insufficient in not alleging that the writing which the respondent was charged to have sworn falsely to was one which the law required to be verified by oath. A judgment upon a verdict of guilty would have been valid unless reversed, and a judgment upon a verdict of acquittal would have been a bar to another prosecution for the same offense.

The trial court had power to hear and determine the cause, and this constituted jurisdiction of the subject-matter. *Vaughan v. Congdon*, 56 Vt. 111; *Perry v. Morse*, 57 Vt. 509. The case, therefore, is entirely different from one where the oath is administered by a person having no legal authority for so doing, as by a person acting merely in a private capacity, or who has authority to administer certain oaths, but not the one in question, or by one who has authority seemingly colorable, but which is in fact unwarranted and merely void. In such cases the oath is not perjury, for it is altogether idle. 1 Russ. Crimes (2d ed.) 520. The case is not different in principle from one where there is a mistrial by reason of error in the admission or rejection of evidence, or in instructions to the jury, or where judgment is arrested by reason of a defect in the declaration, in which cases it could not be seriously contended that false testimony did not constitute the alleged crime.

If the crime of perjury consisted wholly of the wrong done in procuring an unjust verdict, there would be a semblance of reason in claiming that when the verdict was set aside by reason of an insufficient indictment the proceeding was a nullity, and perjury had not been committed. But a wrong verdict, though it may be the result of perjury, is not its essence. All the authorities agree that a prosecution for the offense is not grounded upon the injury or inconvenience which an individual or the public may sustain, but upon the abuse and insult to public justice. 2 Chit. Cr. Law, 157; 7 Bac. Abr. 426. Accordingly it is held that it is immaterial whether the false oath is credited by the triors of the fact or not, or whether the person to whose prejudice it was taken is damaged by it or not. 7 Bac. Abr. *supra*; 2 Bish. New Cr. Law, § 1028.

So it has been held that a witness is guilty of perjury who testifies falsely to a material fact, although he was not competent as a witness in the case, or to prove the particular fact concerning which he testifies. *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255.

It is laid down in 2 Russ. on Crimes (6th ed.) 318, that perjury may be committed on the trial of an indictment which is afterwards held bad upon a writ of error, and *Reg. v. Meek*, 9 Car. & P. 513, is cited as authority. There it was objected that the evidence of the defendant could not have been material, as the former indictment was held bad upon a writ of error for an insufficient assignment of perjury; but the objection was overruled, the court remarking that it would be rather too much to say that whether a witness had committed perjury or not could depend upon the validity in point of form of the indictment as to which he had testified. The ruling sustaining the State's demurrer to the respondent's plea was correct.

2. This indictment is demurred to as insufficient. The simplified form, under No. 29, Acts 1890 (V. S. § 5417, Form 48) is:

"State of Vermont,— County—ss: Be it remembered that at a term of the County Court begun and held at—, within and for the county of —, aforesaid, on the — day of —, A. D. — the grand jurors within and for said county of — upon their oath present that A. B., of —, in the county of —, at —, in the said county of —, on the — day of —, in the year of our Lord eighteen hundred and —, appeared as a witness in a proceeding in which C. D. and E. F. were parties, then and there being heard before a tribunal of competent jurisdiction, and committed the crime of perjury, by testifying in substance as follows: (Here set out the matter sworn to and alleged to be false); which said testimony was material to the issue then and there pending in said proceeding, against the peace and dignity of the State."

This form is followed in the present case down to and including the charge that the respondent "committed the crime of perjury," where it is alleged that he "then and there falsely testified in answer to interrogatories substantially as follows;" and then follow more than 600 questions to and answers by the respondent, covering nearly 40 printed pages, and concluding with the words, "which said testimony was material to the issue

then and there pending in said prosecution, contrary to the form of the statute," etc.

The indictment, without the testimony, only alleges that the respondent was a party to a proceeding tried in the County Court; that he appeared as a witness therein; and that, being sworn to tell the truth relative to such proceeding, he committed the crime of perjury; and the alleged false testimony is recited to show the crime.

The indictment cannot be held good unless it can be construed to allege that the respondent swore falsely in his answers to each and every interrogatory. It cannot be so construed. It would be absurd to give it the construction that he swore falsely about his name and residence; for they are given by him the same as they are stated in the body of the indictment. Neither is it presumable that it was intended to charge that he swore falsely when he testified that he was a taxpayer in Montpelier, and as such, in the year 1895, made out and signed his inventory, and handed it to one of the listers. The same may be said of many other answers given by him in the course of his examination.

There being no designation of the matter or matters in the respondent's testimony that are claimed to be false, the indictment is bad for uncertainty. It does not apprise him of the cause and nature of the accusation against him.

The State relies upon *State v. Camley*, 67 Vt. 323, 31 Atl. 840, as authority for sustaining this indictment; for there, when the specification of perjury is reached, certain questions and answers are recited which do not appear in the published case. While that case is authority for holding that the perjury need not be assigned otherwise than by reciting the testimony, it is not authority for holding that a great mass of testimony may be thrown into an indictment without pointing out in what answers to questions the alleged perjury is contained.

The pro forma ruling is reversed; demurrer sustained; indictment held insufficient, and quashed.

LEE V. STATE.

Tex.—70 S. W. Rep. 425.

Decided November 12, 1902.

PERJURY: Failure to corroborate witness as to alleged falsity.

1. To prove perjury, the alleged falsity must be shown by the testimony of two witnesses, or by one witness strongly corroborated by other evidence.
2. It was claimed that the defendant committed perjury in testifying, that he did not have sexual intercourse with M. On the trial M. alone testified that the defendant had intercourse with her. It was also shown, that subsequent to such alleged intercourse M. went to Louisiana, and that defendant was found at the same place, and it was also shown that the defendant had said, that the M. girls were the nicest girls in the country, and that their parents treated them very badly, and that if they wished an education or desired to leave home, that he would furnish them money for either or both purposes. Held, that there was not sufficient corroboration.

Court of Criminal Appeals of Texas.

Appeal from District Court, Hopkins County; Hon. H. C. Conner, Judge.

John Lee, convicted of perjury, appeals. Reversed.

Crosby & Dinsmore, for the appellant.*Robert A. John*, Assistant Attorney General, for the State.

DAVIDSON, P. J. Appellant was convicted of perjury, and given five years in the penitentiary.

The assignment of perjury, in substance is that appellant, testifying before the grand jury, stated that he did not have sexual intercourse with Mattie Mining at her father's house on the 22d day of November, 1900, where as in truth and in fact he did have such carnal knowledge. There is quite a mass of testimony as to matters occurring prior to and subsequent to the supposed intercourse. Mattie Mining testified that in a shed room at her father's house appellant did have carnal knowledge of her. This was with her full consent, and while other members of the household were in adjoining rooms. There are numerous questions raised, exceptions taken to the introduction of testimony, refusal of charges, and the court's charge. How-

over, we pretermitted a discussion of these matters, because, in our judgment, the evidence does not support the conviction. This being a case of perjury, it was necessary for the State, to sustain the conviction, to prove the falsity of the alleged statement by two credible witnesses, or by one such witness strongly corroborated by other evidence. If it be conceded that Mattie Mining was a credible witness—that is, that she was not an accomplice—then we have her testimony standing alone. So far as we have been able to ascertain from the testimony before us, there is not a fact or circumstance showing that he was at the place where the intercourse should have occurred, except the testimony of Mattie Mining. Some time subsequent to the alleged act of intercourse Mattie Mining left the country, and went to Louisiana. Defendant was also found in Louisiana at the same place. The State's theory is that he induced her to leave Texas and go to Shreveport, Louisiana, and gave her the money to bear her expense of the trip. There are some expressions of the defendant introduced against him to the effect that the Mining girls were the nicest girls in the country, and that their parents had treated them very badly, and, if they wanted an education, or desired to leave home, he would furnish them the money for either or both purposes. The State also undertook to prove that he purchased and gave her a valise to carry with her on the trip to Louisiana. This, however, falls short of a satisfactory conclusion. In fact, they failed to identify appellant as the party who purchased the valise. The girl made many contradictory statements in regard to these matters, and informed her relatives and friends, when questioning her, that appellant had never at any time had sexual intercourse with her, but would subsequently change these statements, and admit that he had had such intercourse. But none of these facts or circumstances corroborate her as to the act of intercourse at her father's house on the 22d day of November. The testimony falls far short of the statutory requirement that the case must be made out by the testimony of two credible witnesses, or of one credible witness and strong corroborating evidence.

Because the evidence is insufficient to support the conviction, the judgment is reversed, and the cause remanded.

WHITTLE V. STATE.

79 Miss. 327—30 So. Rep. 722.

Decided December 2, 1901,

PERJURY: *Record evidence necessary—Special theory of the prosecution to be sustained by two witnesses or one witness with the corroboration.*

1. Where perjury is charged to have been committed at a trial, in a court of record, the nature, date, etc., of such trial must be proved by the record, and not by the oral testimony of the clerk.
2. To prove the alleged perjury, the prosecution having relied on testimony that by reason of the defendant's absence, he could not have known, the matters that he testified to, it was error for the court to refuse to instruct the jury that the defendant should be acquitted, unless his absence was proven beyond all reasonable doubt by two witnesses or by one witness corroborated by circumstances.

Supreme Court of Mississippi.

Appeal from Circuit Court, Perry County; Hon. J. R. Enochs, Judge.

Perry Whittle, convicted of perjury, appeals. Reversed.

Hull & Leverett, for the appellant.

Monroe McClurg, Attorney General, for the State.

TERRAL, J. Perry Whittle was indicted for perjury, predicated on his testimony in the trial in the Circuit Court of Perry County on the 24th of October, A. D. 1900, of one Norwood, for an assault and battery upon Griffin, with intent to kill and murder. No record of said trial was given in evidence, but Mixon, the clerk of the Circuit Court, testified, without objection, that Norwood was tried at the October term, 1900, of said Circuit Court, for assault and battery upon Griffin, with intent to kill. It was essential to prove by the record of the trial of said cause, if in existence, that Norwood was tried on the 24th day of October, 1900, in the Circuit Court of the Second District of Perry County, on an indictment against him for assault and battery upon Griffin; and no such evidence was given or offered. Whart. Cr. Ev. §§ 103-115; Archb. Cr. Prac. & Pl. § 602.

The assignment of perjury made against Whittle was that, at the time of the alleged assault and battery by Norwood upon said Griffin with intent to kill and murder him, Griffin had his right hand in his pocket, with his left hand raised towards and reaching for Norwood, with other circumstances attending said action, and that Griffin had gone from the sawmill to the log camp, some 200 feet apart, where Norwood was, with his right hand in his pocket; and it was sought to convict Whittle of perjury on the ground that he knew nothing of the matter, because he was not present, so as to see what really occurred. This supposition is evident from the tenor of the second instruction to the jury on behalf of the State, which directed them to find Whittle guilty, without regard to whether Norwood was justifiable or not, if they believed, beyond reasonable doubt, he willfully swore falsely, as charged in the indictment. It was not on the materiality of the testimony of Whittle as tending to acquit Norwood that the State predicated a claim for his conviction, but it was predicated upon the ground that Whittle was not a witness of the assault and battery of Griffin by Norwood, as stated by him. In this state of the case the defendant, in his fifth request for instructions to the jury, asked the court to say to them that the State must prove by two witnesses, or by one witness and corroborating circumstances, beyond reasonable doubt, that defendant was not present at the altercation between Norwood and Griffin, or they should acquit him; and this the court refused to do. We are of the opinion that the court should have given the instruction as requested. To prove that Whittle swore that Griffin had his right hand in his pocket at the mill, and kept it in his pocket until he reached the log camp where Norwood was, and then raised his left hand, reaching for Norwood, with the other circumstances charged as attending said action, did not constitute matter material to the guilt or innocence of Norwood, unless it covered the point of proving that Whittle was not a witness to the assault and battery, as he claimed to be; and the instruction refused was material to his defense, and it should have been given as requested.

Reversed and remanded.

PEOPLE v. DOODY.

172 N. Y. 165—64 N. E. Rep. 807.

Decided October 7, 1902.

PERJURY—OTHER CRIMES—ARGUMENT OF COUNSEL: *Witness falsely testifying that he did not remember matters clearly within his knowledge and memory—Rule as to proving falsity by circumstances—Testimony and argument bearing on other crimes, inseparably connected with the issue on trial—Question of fact settled by the jury.*

1. The rule that, in perjury trials, the falsity of the testimony in question must be shown by the testimony of two witnesses, or, by one witness and independent corroborating circumstances, is not binding in a case where no witness can testify directly upon that issue, and the evidence as to the falsity of such testimony is purely circumstantial.
2. It is perjury for a witness to falsely and corruptly testify, that he does not remember matters which are clearly within knowledge and memory.
3. Where circumstantial evidence is clear and abundant, that the accused, charged with perjury, did in another proceeding, willfully and corruptly testify falsely that he did not remember a matter material to the issue, a conviction for perjury will be sustained.
4. The accused having been an active witness before the grand jury and on the trial of several persons, and having testified on such occasions, that he had been engaged in a conspiracy with such persons, and afterwards on a second trial of one of such persons testified that he did not remember the matter in question, and, being indicted for perjury for so falsely testifying, it was proper on the perjury trial to show such testimony as to the conspiracy, as proof of his memory of the facts, and it was also proper for the prosecuting attorney to comment thereon in argument to the jury, even though such testimony connected the accused with other crimes, than that charged in the indictment.
5. In defense, the accused attempted to show, that he had been laboring under a mental disease that had affected his memory. *Held*, that this was a matter of fact, which was fairly and fully tried before the jury, and that the verdict must be considered as the result of fair and deliberate judgment.

Court of Appeals of New York.

Appeal from the Supreme Court, Appellate Division, Third Judicial Department.

Daniel Doody, convicted of perjury, appealed to the Supreme Court, where the conviction was affirmed on June 10, 1902. From this affirmance he appealed to the Court of Appeals. Affirmed.

Jerry A. Werneberg, for the appellant.

John F. Clark, District Attorney, (*Martin W. Littleton*, of Counsel), for the State.

O'BRIEN, J. The defendant was convicted of the crime of perjury, and the judgment of conviction has been affirmed in the court below after what appears to be a thorough discussion of the questions involved. These questions, and the facts out of which they arise, are so fully set forth in the report of the case below that it is not necessary to repeat the statement here. 72 App. Div. 372, 76 N. Y. Supp. 606. It will be quite sufficient for every purpose of a review in this court to refer to the facts in a general way. The charge against the defendant which is set forth in the indictment is that he was called and sworn as a witness on the part of the People in a criminal case on the 19th day of December, 1899, and as such witness on the trial of the case he committed willful and corrupt perjury. The charge is based upon the testimony of the defendant as a witness in the case to the effect that he did not remember certain facts which were material and necessary for the People to prove upon the trial, and which it is alleged were well known to the defendant. The case is peculiar and exceptional in this respect: that the defendant was not charged with swearing falsely with respect to any affirmative or negative fact, but in swearing falsely that he knew nothing about them one way or the other, or, to use his own words when examined as a witness, that he did not remember. The indictment alleges, and the record discloses in great detail, the transactions which finally culminated in the defendant's conviction. On the 14th day of March, 1898, he appeared before the grand jury of Kings County, and then and there testified to certain corrupt and criminal transactions on his part with certain public officers of the city of Brooklyn, whereby they were to award certain contracts for public work to persons to be named by him, and who were to act in his interest, and that he should divide with these officers certain fixed percentages of the money to be paid

on these contracts by the city; that these corrupt and fraudulent agreements between the defendant and these city officers were completely executed. The contracts were awarded to the persons representing the defendant, and the officers were paid the share of the proceeds stipulated. It is not necessary to describe this corrupt arrangement with greater particularity. It is enough to say that the defendant, as he then stated to the grand jury, conspired with various city officers to plunder the city by means of fraudulent and corrupt contracts for public works in the city.

It is important, however, to note the leading and fundamental feature of this transaction. It was impossible to carry the scheme into successful operation without the active aid and co-operation of the several city officers in the different departments. These departments, which were intended by the charter to be checks upon each other, were not only neutralized, but by means of bribery made active participants in the conspiracy to defraud the city. Each officer was to act a designated part in the consummation of a common scheme of fraud, and hence it was impossible to view the act of any one of them in the performance of his part without revealing the details of the conspiracy as a whole, since, if any one of the conspirators failed to act his part, the scheme could not be carried into effect. Therefore, in every investigation concerning the acts and conduct of these several city officers, or the acts of any one of them, it became necessary to describe the whole transaction, in order to show what the real scope and purpose of the scheme was, and the legal responsibility of each and all of the actors therein. The whole scheme was fully revealed by the defendant in his testimony before the grand jury, and the result was that indictments were found against nine of these city officers, in which they were charged with various offenses.

On the 16th of May, 1898, the indictment against Robert W. Fielding, the deputy commissioner of the city works, was brought to trial, and the defendant was sworn as a witness by the prosecution, and again testified substantially to the same facts that he had testified to before the grand jury, and the trial resulted in a conviction. Subsequently, and on April 24, 1899, some of the other city officers were brought to trial, and again the defendant was the principal witness, and revealed all the details of the corrupt and fraudulent conspiracy already

described. So far the defendant's attitude was that of an informer against his confederates in crime. But about the time of the last trial referred to an event occurred which seems to have had some influence upon his mind, and revealed a desire upon his part to change his position. The judgment of conviction against Fielding was reversed in this court, and a new trial granted, not upon the merits, but upon certain exceptions taken at the trial, which related entirely to the argument of the case before the jury by the District Attorney. *People v. Fielding*, 158 N. Y. 542, 53 N. E. 497, 46 L. R. A. 641, 70 Am. St. Rep. 495 (11 Amer. Crim. Rep. 88). The defendant expressed great satisfaction at this result, and stated openly that he was sorry to see him convicted. On the 19th day of December, 1899, Fielding was again brought to trial. While the District Attorney was preparing for the trial, he sent for and had an interview with the defendant, who all along had been his principal witness, and was to be his principal witness on the new trial. The District Attorney called the defendant's attention to an interview between them when the new trial was granted by this Court, wherein the defendant expressed great delight at Fielding's success. He told the defendant that he knew he sympathized with the defense, but he would have to go upon the stand and testify to the facts, and proposed to refresh his memory by reading to him from printed records what he had sworn to on the several previous trials. The defendant said he would be glad to have the testimony read to him, and the District Attorney then proceeded to read it, asking the defendant, after the reading, if it was correct, and as he then recollected it, to which the defendant replied that it was. Only two or three days after this interview the District Attorney called the defendant as a witness to prove the facts upon the new trial to which he had testified on the former trial and before the grand jury, as well as upon the trial of the other officers engaged in the conspiracy. He propounded to him questions in various forms intended to establish the facts charged in the indictment, and to which the defendant had so often testified before, and to all these questions the defendant answered that he did not remember, and in this case these answers have been made the basis of the charge of perjury of which the defendant has been convicted. The prosecution broke down, and the trial resulted in Fielding's acquittal.

In order to sustain the charge of willful and corrupt perjury against the defendant, the prosecution was bound to prove to the satisfaction of the jury that the defendant did remember that he had made the corrupt and fraudulent agreement with Fielding, whereby the latter was to award contracts to the persons designated by the defendant, and had paid to him his share of the proceeds, or the designated percentage of the contract price. It was competent for the People to sustain that issue by circumstantial evidence. The rule that prevails in cases of perjury, where one oath is placed against another, that there must be two witnesses to prove the charge, or, in case only one witness is produced, there must be independent corroborating circumstances, has no application to this case. There was no witness produced upon this trial who could swear that the defendant knew and remembered the facts which were the subject of inquiry. That issue had to be determined upon circumstantial proof. The question for the jury was whether it was true, as the defendant pretended, that in the space of a few days his mind had become a perfect blank with respect to the facts which the questions called for. He had testified to them all before the grand jury, and on the former trial and on other trials only a very brief time before he was examined. Moreover, they were all brought to his attention two or three days before he was called as a witness by the District Attorney, when his former testimony was read to him from the records of these trials, and which he then pronounced correct. The jury could determine from all this whether the defendant told the truth when he said that he did not remember any of the facts embraced in the questions, or whether on that occasion his answers were willfully and corruptly false. It is hardly necessary to add that the verdict upon this question of fact is well sustained by the evidence.

We have no doubt that a charge of perjury may be based upon the testimony of a witness, upon a judicial trial, who has sworn that he did not remember the facts material to the inquiry, if it be shown by competent proof that he did remember them. It may be difficult to prove the charge in many cases, but in this case there was no lack of proof. A witness may commit perjury by falsely stating what he thought, or what he did or did not remember, or what his opinion is, when these matters become material to the issue. It may be difficult to prove that

his thought or his memory or his opinion was otherwise, but that difficulty has been successfully met and overcome in this case. (*Reg. v. Schlesinger*, 10 Q. B. 670; *People v. Robertson*, 3 Wheeler, Cr. Cas. 183; *State v. Henderson*, 90 Ind. 408; *State v. Terry*, 30 Mo. 368; *State v. Knox*, 61 N. C. 312; *Com. v. Grant*, 116 Mass. 17; *Com. v. Brady*, 5 Gray, 78; *Wilson v. Nations*, 5 Yerg. 211; *People v. Courtney*, 94 N. Y. 490; *Bishop, Cr. Law*, § 878; 3 Greenl. Ev. 197; *Rose, Cr. Ev.* 759, 814.)

The general doctrine to be found in these authorities warrants the conclusion that a witness who swears falsely, willfully, and corruptly to the effect that he does not remember certain material facts involved in the issue on trial, when in truth they are within his knowledge and recollection, is guilty of perjury.

One or two questions of law arising upon exceptions taken at the trial have been argued by defendant's counsel. It is claimed that the prosecution were permitted to prove at the trial that the defendant had committed other offenses than the one for which he was on trial. In a literal sense, that may be true, but it is not true within the meaning of the rule of law that excludes proof of other crimes where a party is being tried for a specific offense. (*People v. Molineux*, 168 N. Y. 264, 61 N. E. 286.) The only offense of which the defendant was charged was perjury, and, in order to prove that charge, the prosecution had to put in evidence what the defendant had repeatedly sworn to on previous trials and investigations, to the effect that he had bribed several of the city officers. This testimony was not offered or admitted for the purpose of proving other offenses, but for the purpose of establishing the fact that he remembered and knew certain things which he swore that he did not remember or know. The previous statements and admissions of the defendant were admissible to prove that in stating that he did not remember certain things he testified falsely. The fact that the defendant in these statements, admissions, and declarations accused himself of being a party to the conspiracy to defraud the city did not change the nature or character of the proof which his previous acts and conduct furnished with respect to the truth of his statement that he did not remember these facts when called as an unwilling witness. Everything that the defendant had sworn to or stated previously to the last trial of Fielding was admissible to show that he

remembered the facts when he testified that he did not. The defendant was an informer upon his confederates, and as such he made confessions that not only involved them, but himself as well; but they were none the less admissible to prove that he knew the facts confessed as well upon the last trial as upon the first.

The District Attorney, in his argument to the jury, referred to all the details of the conspiracy as disclosed by the defendant in his testimony on the previous trials and before the grand jury. It was all pertinent to the issue in this case, which was whether the defendant knew and remembered the facts which were first brought to light through his own action. He did not accuse the defendant of any crime not embraced in his own confessions made repeatedly under oath. The general scheme in all its details could be legitimately discussed upon the trial of an issue which involved the question whether the defendant remembered it when called as a witness. In the trial of a criminal case the District Attorney is entitled to discuss before the jury all the facts and circumstances bearing upon the issue with the same freedom that is to be awarded to counsel in any case. He may not attempt to inject into the case facts or circumstances foreign to the issue, or not within the scope of the evidence, but, subject to these restrictions, he is entitled to argue the case with the same freedom of speech that the courts concede to counsel generally in the trial of issues of fact before juries. "The jury system would fail much more frequently than it now does if freedom of advocacy should be unduly hampered, and counsel should be prevented from exercising within the four corners of the evidence the widest latitude by way of comment, denunciation, or appeal in advocating his cause." (Per Andrews, J., in *Williams v. Brooklyn El. Railroad Co.*, 126 N. Y. 102, 103, 26 N. E. 1048.) The several indictments against the city officers found upon the testimony of the defendant were properly admitted in evidence. The jury could not fairly judge with respect to the attitude of the defendant, when he testified that he did not remember the facts involved in the questions propounded, without full information as to his attitude in the past. They were entitled to know all that he had done and accomplished in bringing his confederates to justice, in order to determine whether it was true in fact that he did not remember the events which produced such startling

results to himself and his associates, and, if he still knew and remembered these facts, then to determine his real motives in swearing that he did not. The indictments were the necessary result and outcome of the defendant's mental resolution to make full disclosure of the conspiracy against the city, and they were the basis of all the legal proceedings that subsequently took place in which the defendant participated as the principal witness. The history of the conspiracy in all of its details was necessary in order to give the jury a full and complete view of the defendant's attitude down to the time when he claimed that he had no memory concerning these multifarious and complicated transactions, and the indictments and trials constituted important chapters in that history.

The real defense interposed in behalf of the defendant to the charge of willful and corrupt perjury, and which occupies such a prominent place in the record, was that, at the time when the testimony was given now charged to be false, he was, and had for some time been, suffering from paresis, or some similar mental disease, that paralyzed his memory to such an extent that he could not be held responsible for his answers to the questions propounded to him upon the trial. It is not necessary in this court to say much in regard to that defense. It is quite sufficient to observe that it presented a question of fact that was fully and fairly tried before the jury. The evidence bearing upon it, consisting in part of the opinions of experts, was submitted to the jury, and the verdict must be regarded as the fair and deliberate judgment of the body which, under our system of jurisprudence, is organized to determine matters of fact, that it was without merit. Of course, it is possible that a person may be suddenly afflicted with a mental disease that completely prostrates all of his intellectual faculties, but whether that claim was true or false in this case was a question for the jury. When the evidence bearing upon that issue, direct and circumstantial, is fairly considered, the conclusion of the jury is not open to question.

We think that the record presents no question that would warrant this court in interfering with the judgment, and so it must be affirmed.

PARKER, C. J., and BARTLETT, MARTIN, VANN, CULLEN, and WERNER, JJ., concur.

Judgment of conviction affirmed.

STATE V. COURTRIGHT.

66 Ohio St. 35—63 Atl. Rep. 590.

Decided February 25, 1902.

PERJURY: *Circumstantial evidence alone not sufficient to convict—The alleged falsity must be proven by at least one witness, and corroborating circumstances—General review of the law upon this subject—Inconsistent instructions.*

It is a general rule that, to warrant a conviction under an indictment for perjury, there should be at least one witness to the *corpus delicti*, or the falsity of the matter assigned as perjury, and that the testimony of such witness be corroborated, either by another witness or by circumstantial evidence sufficiently strong to satisfy the jury beyond a reasonable doubt of the guilt of the accused.

(Syllabus by the Court.)

Supreme Court of Ohio.

Error to Circuit Court of Jackson County.

Courtright was indicted for perjury. A conviction was reversed by the Circuit Court. The State brings error. Affirmed.

At the February Term of the Court of Common Pleas of Jackson County for the year 1900, the defendant in error was indicted by the grand jury for cohabiting in a state of adultery with one Amanda Butcher. He was placed on trial at a subsequent term, and in making out his defense he became a witness in his own behalf, and, in his testimony under oath, denied all the acts of illicit intercourse charged in the indictment; but he was found guilty, and sentenced accordingly. By another grand jury he was indicted for the crime of perjury, in that he gave false testimony on the former trial wherein he denied the acts of adultery. On the trial for perjury, no witness was produced by the State who testified to the falsity of the matter assigned as perjury; but the State rested its case for conviction on circumstantial evidence, at the close of which the defendant asked the court to direct a verdict of acquittal. This request was denied, and the defendant introduced his testimony. He was found guilty, and sentenced to a term of imprisonment from which error was prosecuted in the Circuit Court. The grounds of error relied on, and which were sustained by the court, are, in substance:

(1) That the trial court erred in refusing to direct a verdict for the accused at the close of the testimony of the State.

(2) The court erred in the charge to the jury.

The Circuit Court reversed the judgment of the trial court, and remanded the case for new trial and further proceedings. The State now prosecutes error in this court to reverse the Circuit Court, in order that the sentence may be carried into execution.

A. E. Jacobs, for the State.

McGhee & Willis, for defendant in error.

PRICE, J. It is conceded in argument, and also shown by the record, that, on the trial of the defendant in error on the indictment for perjury, the State produced no witness who testified that the matter assigned as perjury was false, but relied for conviction wholly on circumstantial evidence to contradict the sworn statements at the former trial, as well as to make out every other element of perjury. And the absence or lack of such direct principal witness to the falsity of such sworn statements was the ground of the motion to direct an acquittal in the trial court.

The same question was again raised by exception to the charge of the court, and the two points will be considered together, because, the reason which prompted a refusal to direct a verdict for the accused is found in the instructions given the jury.

Looking to the charge of the court, we find two inconsistent views of the law laid down for the guidance of the jury. Each of these views is wrong. One is too strong in favor of the accused, and follows the older English and American authorities, while the other view is opposed to all the authorities, both old and new, and was very prejudicial to the defendant in error. The jury were first told by the court that:

"It is a rule of criminal law, in the trial of perjury, that you cannot find a man guilty of perjury upon the testimony of one witness alone, but it must be corroborated by another witness, or, if not by another witness, then by circumstances which are practically equivalent to the testimony of another witness. That is to say, if there is only one witness in the case who testified to that effect, and the defendant having testified to

the contrary in the former trial, that is oath against oath, and there can be no preponderance; and not only that, but to overcome the presumption of his innocence, and to satisfy the jury beyond a reasonable doubt as to the falsity of the statement which he is charged to have made, it must be established by one witness who must be corroborated and sustained by another witness, or by circumstances which practically amount to the same thing."

This language shows the necessity for the one direct witness, and in this respect is correct; but it places the standard of corroborating proof too high, as we shall presently see. The corroborating facts and circumstances are not required to be equal or tantamount to the second witness. *Crusen v. State*, 10 Ohio St. 258. This part of the charge, as before stated, was too broad, and in favor of the accused; and, while he has no occasion to challenge its soundness, it is a subject of just complaint that the next paragraph of the same charge is not only utterly inconsistent with this, but is also in violation of established rules and principles of practice. In the later paragraph the court wholly abandons the first position taken, and dispensed with the necessity for at least one direct witness to the *corpus delicti*, or falsity of the former testimony, and the jury were told that the lack of this direct witness might be supplied by circumstantial evidence, which should be corroborated by other circumstantial evidence. Here is a part of what the court said on this subject:

"Now, upon this point it is probably true that no witness has testified positively direct to any act of intercourse, but witnesses undertake to detail circumstances and conduct from which the State or prosecution undertakes to say that acts of intercourse took place between these parties.

"Upon this the court says to you, if the witness details conduct or relates a set of circumstances from which the only reasonable conclusion of the jury would be that intercourse must have taken place, in the event that that conduct or circumstance is true, then the witness who testified to that conduct or circumstance from which the jury would necessarily infer intercourse must be corroborated by another witness, or by circumstances which amount to the same thing."

From the language it is clear that the trial court not only dispensed with the essential one witness to the falsity of the

former sworn statement—the *corpus delicti*—which was said to be requisite in the first paragraph quoted, but it is now said that the place of such witness may be supplied by evidence of “conduct or a set of circumstances from which the only reasonable conclusion of the jury would be that intercourse must have taken place,” and that, “in the event that that conduct or circumstance is true, then the witness to that conduct or circumstance from which the jury would necessarily infer intercourse must be corroborated by another witness, or by circumstances which amount to the same thing.”

It will be observed that the Court states a higher degree of corroboration than is required, and it was done at the sacrifice of the more weighty matter of the law, that requires at least one witness to the falsity of the matters assigned as perjury; and the jury was instructed, in substance, that the office of the one witness may be filled by a witness who testifies as to conduct of the accused or to a set of circumstances from which guilt might reasonably be inferred, and that if this witness to conduct or set of circumstances is corroborated by a witness who details other, or, it may be, the same, conduct or circumstances, the accused may be convicted of perjury. The same error is amplified in the remainder of the charge, which we will not quote, but its substance is that the jury might convict of perjury on evidence wholly circumstantial. It has been urged in argument for the State that on account of the inherent difficulty of proving adultery except by circumstantial evidence, and that on the trial for perjury the same difficulty exists in obtaining a witness to the falsity of the sworn statement wherein the defendant denied all adulterous intercourse, the rule should be relaxed in this case. This suggestion may be answered by the fact that the law permits conviction of adultery, as it does of nearly all other crimes, on purely circumstantial evidence, when it is connected and sufficiently strong to carry conviction beyond a reasonable doubt. But owing to the frailties of human memory, it is possible, notwithstanding such evidence, that the actual illicit intercourse never occurred, and that the accused may have truly so stated as his own witness; so that, when he is called upon to meet the charge of perjury in giving such denial of his guilt, his sworn statement to that effect still stands as his evidence, and in addition thereto is the legal presumption of innocence of the perjury, which requires the State to do much

more than re-introduce the circumstantial evidence upon which he was tried for adultery. To convict of some great crimes, more or stronger evidence is required than to convict of others. Of such enormity is the crime of treason, that by express statute unless the accused confess in open court, he shall not be convicted, except by the testimony of two credible witnesses to the same overt act laid in the indictment. See Rev. St. § 7298. And perjury has always been regarded as an unnatural and heinous crime, because of its tendency to jeopardize person and property, and even life; and it may be that our legislature recognized the well-established rule which we hold in perjury cases, when it enacted section 7296 of the Revised Statutes, which is, "In trials for seduction under promise of marriage, and on indictments under section 7024, no conviction shall be had on the testimony of the person offended against, unsupported by other evidence, to the extent required as to the principal witness in cases of perjury." Therefore, we consider that, when one is charged with the grave crime of perjury, it is but a just safeguard that more than purely circumstantial evidence shall be adduced to establish the *corpus delicti*; and we hold it to be the general rule that the falsity of the matter assigned as perjury must be testified to by at least one witness, and that he be corroborated by another witness or by facts and circumstances which will operate as a sufficient corroboration. We do not mean by this to say that the guilty knowledge and corrupt motive attached to perjury must be shown by a living witness. These elements of the crime may be established by sufficient and competent circumstantial evidence.

Until now this court has not been called upon to pass directly on the question before us, but in *Crusen v. State*, 10 Ohio St. 258, the view we favor seems to have been fairly recognized. The court says in that case: "On a trial under an indictment for perjury, it is not error for the court to charge the jury that corroborative evidence, in addition to the testimony of one reliable witness, need not be of sufficient force to equal the positive testimony of another witness, or such as would require a jury to convict in a case where a single witness is sufficient; but it (corroborative evidence) must be such as gives a clear preponderance to the evidence in favor of the State, and, in view of this rule, establishes the falsity of the oath on which perjury is assigned beyond a reasonable doubt." It was not

in dispute in the case cited that one witness swearing directly to the *corpus delicti* was necessary, but the controversy was over the degree of other proofs requisite to corroborate the direct witness.

Our investigation has led to an examination of the authorities and cases cited by counsel, and many others pertinent to the subject under review, and they all point to one rule as to proof of *corpus delicti*. A result of a review of the decided cases is found in 2 Bish. New Cr. Proc. § 927: "A peculiarity of this offense (perjury) relates to the number and corroboration of witnesses. The doctrine is that, since the testimony alleged to be perjured was delivered on oath, such oath, as well as that of the contradicting witness, should be regarded on the trial for the perjury. And where the evidence, thus viewed, presents only 'oath against oath,' it will be insufficient. Whence it became the old rule that two witnesses, directly contradicting what the defendant testified to, are indispensable to a conviction for perjury. But evidently, where there is only one witness directly to the alleged falsity of the swearing, there may be something in the case, or brought forward by a witness who cannot speak to the main charge, indicating with reliable distinctness which of the two contradictory oaths is false. Hence, by the modern rule, it is sufficient that there are two witnesses, or that the testimony of the one witness is corroborated or sustained by other facts appearing in the case, or testified to by other witnesses." The latter rule is fully sustained as the only relaxation of the former more stringent rule, requiring two witnesses to the *corpus delicti*.

Indeed, we find no case or other authority that sustains the contention of the State—not even a case cited by its counsel. We were referred to section 468 of Underhill on Criminal Evidence, and this is what that author says: "According to the earlier cases, no conviction of perjury could be had unless the falsity of the evidence given under oath was proved by the direct evidence of two witnesses; the evidence of the second witness being required to overcome the presumption of innocence which the law indulged in favor of the accused. Such is not the law now. The accused may be convicted on the evidence of one witness, which, however, must in all cases be corroborated. The corroboration need not be equivalent or tantamount to another witness. But it must be clear and positive, and so strong that, with the evidence of the witness who testi-

fies directly to the falsity of the defendant's testimony, it will convince the jury beyond a reasonable doubt. The direct evidence of the witness may be corroborated by circumstantial evidence." * * * However, chief reliance is placed by the State on *U. S. v. Wood*, 39 U. S. 430, 10 L. Ed. 527, and we have carefully examined that case; but it does not aid the cause of the State. The most that can be properly claimed for it is that it provides an exception to the general rule, but we are of opinion that it does not even do that. There the defendant was indicted, under the revenue collection laws then in force, for the crime of perjury, alleged to have been committed by him in swearing or making oath as to the cost of the goods imported and contained in his invoice of the goods purchased of his father in England. On the trial he claimed no conviction could be had without the testimony of a living witness as to the falsity of his oath to the documents. Instead of such a witness, the court permitted documentary evidence to be given, consisting of an invoice book and thirty-five letters from the defendant to his father, by which documents counsel for the government claimed it was shown that the defendant well knew the cost of the goods when he made the false oath of a much lower price. His own written statements—the letters signed by him—were, in one sense, living and direct witnesses to his perjury. They were in the nature of written admission of guilt. And the court in that case, instead of adopting a different rule, clearly recognized the one as well settled, and said: "The case in which a living witness to the *corpus delicti* of a defendant in a prosecution for perjury may be dispensed with are 'all cases where a person charged with a perjury by false swearing to a fact directly disproved by documentary or written testimony springing from himself, with circumstances showing corrupt intent; all cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath being proved to have been taken; in cases where the party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing and being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact re-

cited in it.''' If the *Wood Case* can be construed into an exception, it is such an exception as proves the general rule.

The judgment of the Circuit Court was right, and it is affirmed. Judgment affirmed.

WILLIAMS, C. J., and BURKET, DAVIS, and SHAUCK, JJ., concur.

PEOPLE v. MARTIN.

175 N. Y. 315—96 Am. St. Rep. 628—67 N. E. Rep. 589.

Decided June 9, 1903.

PERJURY: *False affidavit made in one State as to matters required to be upon oath under the statutes of another State—Comety.*

1. Under Section 96 of the Penal Code of New York, which provides: —"A person who swears * * * that any * * * affidavit or other writing by him subscribed, is true * * * on any occasion in which an oath is required by law, or is necessary for the prosecution of a private right, or for the ends of public justice, or may lawfully be administered, and who * * * on such * * * occasion, willfully and * * * deposes * * * falsely, in any material matter, or states in his * * * affidavit, * * * any material matter to be true which he knows to be false, is guilty of perjury," a false affidavit made in the State of New York, in respect to the matters of a corporation organized under the laws of another State and which matters are by the laws of such other State required to be stated under oath, is perjury.
2. Under this statute, the taking of any false and corrupt oath is perjury; unless it is purely voluntary and extrajudicial, in not being required, authorized, or permitted by any law that might be enforced or carried into effect in New York or elsewhere, or in not being necessary for the prosecution or defense of a private right, or for the ends of public justice, wherever sought to be administered.
3. While foreign laws which are in conflict with local policy, regulations or principles are not to be regarded, "the observance or recognition of foreign or inter-state law rests in comity and convenience, and in the aim of the law to adapt its remedies to the great ends of justice."
4. "It is not the comity of the courts, but of the State, which is administered, and ascertained in the same way and guided by the same reasoning by which all principles of municipal law are ascertained and guided."

Court of Appeals of the State of New York.

Appeal from the Appellate Division of the Supreme Court, First Judicial District.

Robert L. Martin and others were indicted in the General Sessions for perjury. The court sustained a demurrer to the indictment. The People appealed, and the order sustaining the demurrer was reversed by the Appellate Division of the Supreme Court. The defendants then appealed to the Court of Appeals; but, the order of the Appellate Division, reversing the order of the General Sessions was affirmed.

Frederick R. Kellogg and Franklin Bien, for the appellants.

William Travers Jerome, District Attorney, (*Howard S. Gans*, of counsel) for the People.

MARTIN, J. We have reached the conclusion that the judgment of the Appellate Division should be affirmed. We also concur in the able opinion of that court, and should rest our decision thereon but for the intimation therein that the words "required by law," contained in the statute defining the crime of perjury, are to be limited to affidavits and oaths required by the laws of this State. With that suggestion we do not agree. Hence, the only question we deem it necessary to consider is whether, under our statute, a person taking a false and corrupt oath in this State, required or permitted by the laws of a sister State, is guilty of the crime of perjury.

Section 96 of the Penal Code, so far as material to the question involved, declares: "A person who swears * * * that any * * * affidavit or other writing by him subscribed, is true * * * on any occasion in which an oath is required by law, or is necessary for the prosecution or defense of a private right, or for the ends of public justice, or may lawfully be administered, and who * * * on such * * * occasion, willfully and knowingly * * * deposes * * * falsely, in any material matter, or states in his * * * affidavit, * * * any material matter to be true which he knows to be false, is guilty of perjury. The indictment in this case charges that the defendants were, respectively, president and secretary of the Delaware Surety Company, a corporation duly organized and existing under the laws of that State; that by the general corporation law thereof, the president, with the secretary or treasurer, of every such corporation, is required,

on the payment of the capital stock thereof, to make a certificate stating whether it has been paid in cash, or by the purchase of property, and stating also the total amount of the capital stock paid in, which certificate must be signed and sworn to by the president and secretary or treasurer, and, when so verified, to be filed in the office of the Secretary of State; that on the 15th of May, 1901, in the City of New York, the defendants appeared before a notary public, duly appointed, sworn, and qualified in and for the County of New York, and thereby duly authorized and empowered to administer oaths and take affidavits, and falsely, corruptly, and knowingly made oath to a certificate that the entire capital stock of said surety company, of \$1,000,000, had been paid in cash, which they uttered and published as true, and the same was filed in the office of the Secretary of State of the State of Delaware.

The important question is whether the indictment shows that the officer before whom the affidavits of the defendants were taken had jurisdiction to take their oaths thereto. That he had general authority to take affidavits, there can be no doubt. Executive Law, § 85; Laws of Delaware, vol. 17 c. 212. But the more difficult question is whether the defendants' affidavits were taken and sworn to upon an occasion in which an oath was required by law, was necessary for the prosecution or defense of a private right, was for the ends of public justice, or was one in which oaths might be lawfully administered, within the spirit and meaning of section 96. The strenuous contention of the appellants is that the occasion mentioned in the statute must be one established, required, or permitted by the laws of this State, and that the fact that such affidavits were required or permitted by the laws of a sister State, or they were necessary for the prosecution or defense of a private right or for the ends of public justice in such other State, does not constitute such an occasion as is contemplated by the statute. This seems a very narrow, technical, and restricted construction of the broad language of that statute—one that can hardly be considered as within the purpose of the Legislature—and should not be adopted unless required by that statute, or some other controlling principle of law.

It is to be observed that the statute has essentially enlarged the rule which existed at common law in relation to the crime of perjury. The evident purpose of the Legislature was to

adopt a statute which would include and provide for the punishment of the act of taking a false and corrupt oath in this State whenever it was required or permitted by our laws, or by the laws of any other State or Commonwealth that might be regarded or treated as valid here. In other words, the purpose of this statute was to include within the definition of the crime of perjury the taking of any and every false and corrupt oath, unless it was purely voluntary and extrajudicial, in not being required, authorized, or permitted by any law that might be enforced or carried into effect in our jurisdiction or elsewhere, or in not being necessary for the prosecution or defense of a private right, or for the ends of public justice, wherever sought to be administered. That this was the broad purpose of that statute is not only plainly indicated by the language employed, but when we examine it in the light of the history of its adoption, in connection with the other provisions of the Penal Code relating to the subject of perjury, and construe it in accordance with the provisions of section 11 of that Code, it becomes obvious that such was its intent and purpose.

While the statutes of one State which derive their force from the authority of the Legislature that enacts them have no absolute or exclusive force or vigor beyond the boundaries of the State, but must be regarded as foreign laws, of which courts do not take judicial notice, still they may be proved and taken into consideration in proper cases, subject to the provisions of domestic statutes and of the Constitution. This principle is based upon the common and international law operating in the comity which exists between civilized nations and States, to which, as between the States of the Union, is added the force of the Federal Constitution. It is true, there has been some difference of opinion as to the effect of the provision of the Constitution (article 4, § 1) which declares that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State;" it being claimed, upon the one hand, that this provision is unlimited and requires each State to give full and absolute faith and credit to the acts of another State, and, on the other hand, that it imports no more than that such credit should be given by one State to the public acts of another as by the rules of comity between the States is ordinarily conceded to the laws of another State. The latter view is sustained by the general weight of authority, and

especially by the decisions of the courts of this State. The observance or recognition of foreign or interstate law rests in comity and convenience, and in the aim of the law to adapt its remedies to the great ends of justice. This principle of comity is not, however, unlimited, as cases sometimes arise where the observance of such laws would be neither convenient nor answer the purpose of justice. Where foreign laws are in conflict with our own regulations or our local policy, or do violence to our views of religion or public morals, or may do injustice to our citizens, they are not to be regarded in this State. Whatever force and obligation the laws of one State have upon another depends upon the laws and regulations of the latter; that is to say, upon its own proper jurisprudence or policy, or upon its own express or tacit consent. In harmony with the general law of comity obtaining among the States composing the Union, the presumption to be indulged in is that the law of a sister State is valid, and when proven should be recognized, unless forbidden by the laws of our State, or by its public policy, to be deduced from the general course of legislation, or from the settled adjudications of its highest court. *Cowel v. Springs Co.*, 100 U. S. 55, 25 L. Ed. 547; *Christian Union v. Yount*, 101 U. S. 352, 356, 25 L. Ed. 888. In the absence of any positive rule affirming, denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interest. It is not the comity of the courts, but the comity of the State, which is administered, and ascertained in the same way and guided by the same reasoning by which all other principles of municipal law are ascertained and guided. "The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations." *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274.

It is under the principles of this general law of comity that one State is permitted to procure the testimony of witnesses in

another, or to obtain their affidavits or acknowledgments to be used in the former. 1 Greenleaf on Evidence, § 320. Under it, contracts made in one State are enforced in another; rights of action given by the laws of one State are so enforced, even though of a tortious nature. These general rules of comity have been so often recognized and adopted by the courts of this State, and under such a variety of circumstances, that reference to specific cases would be a work of supererogation. *Bank of Augusta v. Earle*, 13 Pet. 519, 589, 10 L. Ed. 274; *Paul v. Virginia*, 8 Wall. 163, 19 L. Ed. 357; *Christian Union v. Yount*, 101 U. S. 352, 356, 25 L. Ed. 888; *Parsons v. Lyman*, 20 N. Y. 103; *Bonati v. Welsch*, 24 N. Y. 157; *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Debevoise v. N. Y., L. E. & W. R. Co.*, 98 N. Y. 377, 50 Am. Rep. 683; *Matter of Waite*, 99 N. Y. 433, 2 N. Y. 440; *Cross v. U. S. Trust Co.*, 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597; *Barth v. Backus*, 140 N. Y. 230, 35 N. E. 425, 23 L. R. A. 47, 37 Am. St. Rep. 545; *Stoddard v. Lum*, 159 N. Y. 265, 53 N. E. 1108, 45 L. R. A. 551, 70 Am. St. Rep. 541; *Howarth v. Angle*, 162 N. Y. 179, 56 N. E. 489, 47 L. R. A. 725.

We think it is clear that, in adopting the statute relating to the crime of perjury, the Legislature intended to include not only any and every false and corrupt oath and affidavit taken or made in this State which is permitted or required by our statutes, but also to include any and every oath or affidavit so taken or made, if permitted or required by the laws of any other State of the Union, whenever, under the general law of comity which exists between the States, they would be considered and given effect in this State. Hence it is apparent that under this principle it will be the duty of the court before which this indictment is pending, on the trial and upon proof of the statute of Delaware requiring the affidavits made by the defendants, to take that statute into consideration, and to give it full force and effect, as it is not repugnant to, but in consonance with, our laws. Any other conclusion would require an utter disregard of a firmly established principle of law, open an avenue of immunity for perjury, and thus seriously affect the proper administration of justice. It is a matter of common knowledge that many, if not most, of the corporations doing business in this State, in which our citizens are principal offi-

cers and stockholders, are incorporated under the laws of some other State. If such officers are to be exempt from the consequences of taking a false and corrupt oath in pursuance of the statute under which their corporation was organized, because taken in this State, the security given by the laws of its organization would be practically nullified, and this State would become a paradise for perjurers.

It is to be borne in mind that there is no attempt in this case to enforce the criminal law of the State of Delaware, but to simply have accorded to the law of that State the force to which it is entitled, and thereby establish the existence of an occasion where the oath taken by the defendants was required. The infraction of the criminal law for which the defendants are indicted was that of our own State, which forbids the taking of a false and corrupt oath whenever lawfully permitted or required. The crime was committed in this State, and affected the peace, dignity, and good order of our own commonwealth, and the fact that it may have directly or indirectly affected a corporation which was organized under the State of Delaware in no way affects the question as to where the crime was actually committed.

We have confined our discussion to the one question suggested at the beginning of this opinion, and, as we are satisfied that the case was correctly decided by the learned Appellate Division, we regard any special consideration of the other questions, or any review of the authorities relied upon by that court, as unnecessary.

The judgment of the Appellate Division should be affirmed.

BARTLETT, HAIGHT, VANN, CULLEN and WERNER, JJ., concur. O'BRIEN, J., dissents.

Judgment affirmed.

WILSON v. STATE.

115 Ga. 206—90 Am. St. Rep. 104—41 S. E. Rep. 696.

Decided March 26, 1902.

PERJURY: *Variance—Materiality—Collateral matter—Variance as to descriptive matter.*

1. Perjury may be assigned upon the false testimony going to the credit of a witness.

2. Where an indictment for perjury charged that the offense was committed by falsely swearing in a judicial proceeding, consisting of a preliminary investigation of one warrant against two persons, and the proof showed a preliminary investigation of two warrants, one against each of such persons, the variance was fatal.

(Syllabus by the Court.)

Error to Superior Court, Whitfield County; Hon. A. W. Fite, Judge.

Hamp Wilson, convicted of perjury, brings error. Reversed.

W. E. Mann and W. H. O'Dell, for the plaintiff in error.

Sam P. Maddox, Solicitor General, for the State.

COBB, J. The accused was arraigned upon an indictment charging him with the offense of perjury. He demurred to the indictment, and his demurrer was overruled. The case went to trial, and resulted in a verdict finding the accused guilty. He brings the case here upon a bill of exceptions, assigning error upon the overruling of his demurrer, and upon the refusal of the court to grant his motion for a new trial.

1. The demurrer contains numerous grounds, but, as only two of these grounds were insisted on in the brief of counsel for plaintiff in error, none of the other grounds will be considered. One of the grounds argued in the brief set up that the indictment was defective for the reason that it did not appear therefrom that the testimony of the accused, which was alleged to be false, was material to the issue under investigation in the trial in which the accused was sworn as a witness. The indictment alleged, in substance, that in the case of the State against R. E. Sloan and David Sloan, charged with the offense of arson before S. B. Felker, a justice of the peace—the judicial proceeding being a preliminary investigation before such justice upon a warrant issued against the Sloans—the accused, after having been duly sworn as a witness, falsely testified that he had not on a day named made an affidavit before a notary public; such affidavit being set out in full in the indictment, and containing, in substance, averments that the affiant knew of his own knowledge that the Sloans had burned the house, and were guilty of the offense of arson, as set forth in the warrant under which they had been arrested, and which was the foundation of the judicial proceeding then pending before Felker, the jus-

tice of the peace; the indictment concluding with the allegations that the accused, upon the trial of the Sloans, after a lawful oath had been administered to him, swore that he had not made the affidavit just referred to, when, in truth and in fact, he had made the affidavit, and well knew this fact when he swore to the contrary. In the preliminary trial before the justice of the peace to determine whether the Sloans should be held to answer for the offense of arson, was the fact that the accused denied that he had made an affidavit which in effect charged that the Sloans were, within his own knowledge, guilty of the offense set forth in the warrant, material to the matter then under investigation; that is, whether the Sloans should be held to trial upon the charge of arson? One cannot be convicted of the crime of perjury unless the false testimony related to a matter material to the issue under investigation. In other words, falsely swearing to an immaterial matter is not an indictable offense. It is not, however, essential that the fact sworn to should be material to the main issue in the case, but it is sufficient if it relates to an issue which is only collaterally involved. See *State v. Shupe* (Iowa) 85 Am. Dec. 485, and notes on page 493. If a witness is called in a case, and testifies to a given state of facts, his credibility may be attacked by showing that on another occasion he had stated or sworn to an entirely different state of facts; that is to say, he may be impeached by proof of contradictory statements made as to matters relevant to his testimony at other times, either under oath or not under oath. Before he can be impeached in this way, however, it is necessary that his attention should be called to the time, place, and circumstances of the former statement; and, if the statement was made in writing, it should be shown to him, or read in his hearing. Civ. Code, § 5292. If he is called to testify to any material issue in the case, any matter relating to his credibility as a witness becomes collaterally material to the issue on trial; and, being thus collaterally material, perjury may be assigned upon false testimony affecting the credibility of the witness. See the numerous cases cited in the notes to *State v. Shupe*, *supra*, on pp. 493-4. Mr. Bishop, in his work on Criminal Law (Vol. 2, 8th ed.) § 1032 (3), says: "The credit of a witness is always an element adapted to vary the result of the trial of a fact. Therefore, it is a collateral issue therein. And it is perjury to swear corruptly and falsely to

anything affecting such credit; as that he had not made a specified statement material in the case; that he has not expressed hostility to the defendant; that he has never been in prison." See, also, *U. S. v. Landsberg*, (C. C.) 23 Fed. 585, and cases cited, where Benedict, J., says: "The rule of the common law in regard to perjury is thus stated by Archbold, 'Every question in cross-examination which goes to the witness' credit is material for this purpose.' Arch. Cr. Pl. & Proc. (Eng. ed.) 817. The same rule was declared by the twelve judges in *Reg. v. Gibbons*, 9 Cox, Cr. Cas. 105." In *People v. Courtney*, 94 N. Y. 491, 494, Andrews, J., said: "The recent cases sustain the view that perjury may be assigned upon false testimony going to the credit of a witness;" citing, *Reg. v. Glover*, 9 Cox, Cr. Cas. 501; *Reg. v. Lavey*, 3 Car. & K. 26. See, also, 2 Whart. Cr. Law (10th ed.) §§ 1277-8; *Salmons v. Tait*, 31 Ga. 676.

The other objection raised by the demurrer to the indictment was, that it did not appear therefrom that the oath was administered by Felker, the justice of the peace, or by any one authorized to administer an oath. It is unnecessary, and it would be unprofitable, to set forth the allegations of the indictment in full. It is sufficient to say that the indictment alleged that the accused was called as a witness in the trial of a case before Felker, a Justice of the peace; that, as such witness, a lawful oath was administered to him; and that Felker, the justice of the peace, "had lawful power and authority to administer said oath." When this part of the indictment is construed as a whole, no other legitimate inference can be drawn therefrom than that Felker, the justice of the peace, administered the oath to the accused. There was no merit in this ground of the demurrer.

2. The indictment alleged that the judicial proceeding in which the accused was sworn as a witness was, "the case of the State against R. E. Sloan and David Sloan," based on "a warrant" issued by Felker, a justice of the peace. This was an allegation, in effect, that there was only one case, which was founded upon one warrant, and this warrant was issued against both of the Sloans; that is, it was a warrant charging them jointly with the commission of the offense. The evidence upon the trial showed that the investigation before Felker, the justice of the peace, was upon two warrants—

one against R. E. Sloan and the other against David Sloan. The allegation was one case against two persons, founded upon one warrant against two persons. The proof was two warrants, each being against one person only, and two cases, each against one person only. This was a fatal variance. The fact that the person named in the two warrants were the same persons referred to in the allegations in the indictment in reference to one warrant, and the fact that the preliminary trial was had upon both warrants at the same time, does not affect the question at all. The allegation and the proof do not agree, no matter how we view it. In a prosecution for perjury, it is essential to correctly describe and accurately prove the judicial proceeding in which the perjury is alleged to have been committed. It must be accurately described in the indictment, and must be proved substantially as laid. That the judicial proceeding consisted of a criminal case against two persons is not proved, literally or in substance, by evidence showing two criminal cases, one against each of two persons, although such persons may be identical with those referred to in the joint case. In *Walker v. State*, 96 Ala. 53 (11 So. Rep. 401), it was held: "In a trial for perjury, where the indictment charges that the defendant falsely made an affidavit for a new trial in a civil action by one G against him, an affidavit for a new trial in the case of *G et al.* against him should not be admitted in evidence against the defendant's objection on the ground of variance." Walker, J., in the opinion, says: "This evidence did not correspond with the allegation of the indictment as to the description of the proceeding in which the affidavit was made. A suit by Jacob Griel and others is not properly described as a suit by Jacob Griel alone. The proceedings alleged and the one proved are not identical. It cannot be affirmed that the case mentioned in the affidavit was the same as the one described in the indictment. The allegation of the indictment in this regard is material matter of description. It imports a suit in which there was but one plaintiff. The proof offered does not correspond with that description." See, also, in this connection, *Jacobs v. State*, 61 Ala. 448; *Gandy v. State*, 27 Neb. 707 (43 N. W. 747, 44 N. W. 108). The court erred in not

granting a new trial upon the ground that there was a fatal variance between the allegations and the proof.

Judgment reversed.

All the justices concurring, except Little and Lewis, JJ., absent on account of sickness.

NOTE—The following are interesting cases on the subject of variance:—

Watson v. State, 52 Tex. App. 11 (1878).—Allegation that W. offered M. \$150 if M. would give certain false testimony on the hearing of a writ of *habeas corpus* pending in behalf of G.; held not to be supported by proof that W. told M. that G. would pay M. that sum if M. would so testify.

Maul v. State, 26 S. W. Rep. 199 (Tex. 1894).—Where an indictment charges that the defendant committed perjury in swearing that he did not see a gaming table in a certain house, proof that he did see a gaming table in the structure attached to the saloon closed in on four sides but not above, is insufficient to sustain a conviction.

U. S. v. McNeal, 1 Gall 387 (1813).—Perjury charged to have been committed at the Circuit Court held on the 19th day of May. Record shows the Court to have been held on the 20th day of May. The variance is fatal.

State v. Hayes, 8 Ohio Dec. 454; 8 Weekly Law Bulletin 26 (1882).—An indictment charging that the defendant took a false oath in a certain action then pending is not supported by proof that he made a false affidavit for a writ of replevin, as the action in replevin is not pending until summons is issued and summons does not issue until after the affidavit is filed.

McClerkson v. State, 105 Ala. 107; 17 So. Rep. 123.—There is a fatal variance, where an indictment for perjury alleging that the defendant was sworn "by the clerk of such County," and the evidence showing that the officer who administered the oath was the clerk of a city court.

State v. Porter, 2 Hill Law 611 (S. C. 1835).—An indictment for perjury which charged the oath to have been taken on the gospels, will not be sustained on proof that the oath was taken with an up-lifted hand.

Williams v. State, 7 Humph. 47 (Tenn. 1846).—The indictment for perjury charged that the "defendant was sworn and took his corporal oath upon the holy gospels of God swearing the truth of the matters contained in his answer." The oath was to an answer in chancery, as set forth on his own knowledge and that those set forth on information he believed to be true. The proof did not sustain the charge.

Roberts v. People, 99 Ill. 275 (1881).—The proof must strictly conform to the allegations in the indictment or the variance will be fatal.

Dill v. People, 19 Colo. 469, 36 Pac. 229, 41 Am. St. Rep. 254;—Indictment for perjury based upon a written instrument set out an

indictment. The instrument offered in evidence bore a different date from the instrument described in the indictment. Fatal variance.

Wohlgemuth v. U. S., 6 N. M. 568, 37 Pac. Rep. 854 (1892).—An indictment for perjury charged the defendant in making proof to a pre-emption claim that he falsely swore that he made actual settlement on or about February 1, 1886, and that he built a house and resided on the land continuously until September 1, 1886. The evidence was written testimony of defendant taken for the purpose of proving up his claim which showed that he testified that he had made a settlement of the land about February 1, 1886, and in answer to the question "Has your residence thereon since been continuous?" he answered "Sometimes I had to make money to improve my place." No mention of a house was made in the testimony. The variance was fatal.

State v. Avera, 4 N. C. 669 (1817).—The indictment charged perjury in that the defendant swore that he did not execute a certain deed. The jury found that he denied his signature. The judgment was arrested.

State v. Ahsam, 7 Ore. 477 (1879).—Defendant under indictment for perjury in having sworn that he saw A. at the house of B. on October 30th offered testimony to show that he swore that he saw A. at the house of B. on October 29th. *Held*, that such proof would amount to a variance.

Leverette v. State, 32 Tex. Cr. 431, 24 S. W. 416.—The indictment charged that the accused testified that one S. did not use to him certain abusive language tending to a breach of the peace. Proof that defendant testified that he did not hear or remember such language is a fatal variance.

State v. Green, 100 N. C. 547—6 S. E. Rep. 402 (1898).—Indictment for perjury in a case v. John Green; but the warrant in that proceeding contained the name G. Green. *Held*, fatal variance.

State v. Davis, 69 N. C. 383 (1873).—Indictment for perjury. It alleged the oath to be "on the Holy Gospels of God." Such oath not proven. *Held*, fatal variance.

State v. Lewis, 93 N. C. 581.—An indictment for perjury charging the wrong term of court is a fatal variance.

State v. Tappan, 21 N. H. 56 (1850).—Indictment for perjury. The charge that the defendant swore falsely that the sum of \$20 was unlawfully received as interest on a loan of \$400 is not sustained by evidence that the amount of the loan was \$350 and a note of \$400 and interest given.

Com. v. Monahan, 75 Mass. 119 (1857).—An indictment for perjury by testifying upon the trial of a complaint for an assault upon this defendant that the person complained of did not assault him on the day named, whereas in fact as this indictment alleged he did so assault him on that day, is not supported by evidence that the defendant testified as alleged and that he was so assaulted either on the day named or the day before.

State v. Harvell, 49 N. C. 55 (1856).—Allegation that A. and four

others committed an assault upon B. Not proved by the production of a record which sets forth a bill of indictment charging A., with five others, with assault upon B.

STATE EX REL DONOVAN V. SECOND JUDICIAL DISTRICT
COURT OF SILVER BOW COUNTY.

26 Mont. 275—67 Pac. Rep. 943.

Decided February 14, 1902.

PRACTICE—HABEAS CORPUS—WRIT OF SUPERVISORY CONTROL—PRELIMINARY EXAMINATION—PERJURY: *Writ of supervisory control to set aside an order for discharge on habeas corpus denied—Proceedings in a preliminary examination insufficient to show materiality of testimony on which perjury was charged—Questions of practice.*

1. On a preliminary examination for perjury before a committing magistrate, where the decree in the cause in which the alleged false testimony was given is offered in evidence, but the judgment roll is not admitted or considered, the evidence fails to show that the alleged false testimony was material to any issue in the cause, and the party cannot be held for trial.
2. On *habeas corpus* to secure the discharge of a prisoner held for perjury, where the petition avers that the transcript of the evidence in the case in which the alleged false testimony was given contains all the evidence, and the prosecuting attorney does not controvert such allegation, but the transcript does not show that the judgment roll was admitted or considered, the court will assume that it was not received, and therefore will grant the writ.
3. Under Penal Code, sections 1730-1732 no leave of court is necessary to file an information after commitment on preliminary examination, and a writ of supervisory control will not issue to compel the granting of leave.
4. Under those sections, leave to file an information without a preliminary examination may be granted or refused within the sound discretion of the court, when no statement is made to the court of the evidence upon which the State relies for a conviction, and a writ of supervisory control to revise such discretion was therefore denied.

Supreme Court of Montana.

Application for a writ of supervisory control by the State, on the relation of James Donovan, Attorney General, against

the Second Judicial District Court in and for the County of Silver Bow. Writ denied.

James Donovan, Attorney General, *pro se*.

MR. CHIEF JUSTICE BANTLY delivered the opinion of the court:

On January 22, 1902, after a preliminary examination by John Nelson, a justice of the peace of Silver Bow County, one W. M. Ross was held to answer to the District Court upon a charge of perjury. Ross, failing to give bond for his appearance, was committed to jail. On the following day he petitioned the District Court of that County, Hon. J. B. McClerman, the judge, presiding, for a writ of *habeas corpus*, asking for his release from custody on the ground that the evidence taken before the committing magistrate wholly failed to show reasonable or probable cause to believe that the petitioner was guilty of perjury, or any other offense, and therefore that his detention was illegal. The petition was accompanied by a transcript of the evidence taken before the committing magistrate, and alleged that the transcript contained the whole of such evidence. After a hearing by the District Court, an order was made discharging the prisoner on the ground that the evidence failed to show probable cause. The Attorney General, deeming the County Attorney of Silver Bow County disqualified by reason of his previous connection with the litigation in the cause in the District Court of Silver Bow County, in which the perjury by Ross is alleged to have been committed, appeared for the State both at the preliminary examination held by the magistrate and at the hearing of the *habeas corpus* proceedings in the District Court. After the prisoner was discharged, the Attorney General presented his written application to the District Court asking leave to file an information against Ross charging him with the crime of perjury. Such leave was refused by the court, the judge thereof remarking that it was his opinion that before an information should be filed in the District Court another preliminary examination should be had before a committing magistrate. The Attorney General thereupon, on February 13, filed in this court his petition setting forth the history of the proceedings in the District and Justice's Courts

of Silver Bow County, together with a transcript of the evidence submitted to the District Court at the hearing on the application for the writ of *habeas corpus*, and asked this court to issue its writ of supervisory control to the District Court, with direction to it to vacate and set aside the order of discharge, and to permit the information to be filed.

Without considering the question whether the extraordinary power of this court may be invoked in every case where the District Court has acted erroneously in making an order of discharge upon *habeas corpus*, we are satisfied upon the showing before us that the District Court committed no error in granting the order discharging the prisoner. There was no evidence before that court tending to show that the crime charged had actually been committed by Ross. The cause in which he is alleged to have testified falsely was the cause of Bordeaux against Bordeaux, tried and disposed of in that court during the month of August of last year. The transcript of the evidence taken before the committing magistrate and submitted to the District Court does not show that his testimony was upon any material issue involved in the case of Bordeaux against Bordeaux. Indeed, there is no showing as to what the issues in that cause were. The transcript of the evidence shows distinctly that the decree in the case of Bordeaux against Bordeaux was offered in evidence in the preliminary examination before the committing magistrate, but it fails to set out the judgment roll, or any part thereof, and it does not appear that the judgment roll was admitted or considered by the committing magistrate. The transcript of the proceedings discloses that one of Ross' attorneys made the following offer: "Now, I offer the entire judgment roll and decree in the District Court—not part of it, but all of it—in case No. 7,763, being contained in four typewritten pages, and indorsed upon the back, the decree: 'Filed September 28, 1901. Samuel M. Roberts, Clerk, by J. F. Davies, Deputy'—being the original decree, signed by his Honor Judge Claney. Is there any objection to that?" To this the first assistant Attorney General replied, "No; let it go." If the foregoing statement of what occurred at the hearing stood alone, we might possibly infer from it that the whole of the judgment roll was admitted and considered by the magistrate. In view of the fact, however, that the petition for the writ of *habeas*

corpus addressed to the District Court stated that the transcript contained the whole of the evidence heard by the magistrate, and that the Attorney General appeared in that proceeding, and did not controvert the allegation of the petition, thus admitting its truthfulness, we must conclude that such evidence was not admitted nor considered by the committing magistrate. It therefore could not have been considered by the District Court, as the matter was there presented. Hence the conclusion of the District Court was correct that the committing magistrate had no evidence before him tending to show that the alleged false testimony given by Ross in the case of Bordeaux against Bordeaux was material to any issue therein.

Furthermore, if the Attorney General, in making his request to the District Court for leave to file an information, was doing so in order that he might file it after commitment upon preliminary examination under Sections 1730-1732 of the Penal Code, then his request was unnecessary, as no permission of court is required in such case; and a petition for a writ of supervisory control would not lie to compel the court to give the prosecuting attorney leave to do what he could do without such leave. If, however, the Attorney General considered that the action of the District Court in the *habeas corpus* proceedings had finally disposed of the case under the commitment by the magistrate, and desired to ask leave to file the information under the provisions of the sections cited, as if no commitment proceedings had been had, then his petition for a writ of supervisory control must be denied, for the reason that it lies within the sound discretion of the court to grant or refuse such leave to file the information when no statement is made to the court of the evidence upon which the State would reply for a conviction.

Nothing herein shall be construed, however, to the effect that this court holds that the writ of supervisory control is the proper remedy in case such a statement had been made to the court and it had refused leave to file the information. This question, not being before us, is reversed.

There is a suggestion in the petition of the Attorney General that the District Judge was removed by prejudice in making the order of discharge and in refusing leave to file the information, by reason of an alleged former connection with the case

of Bordeaux against Bordeaux as counsel for the plaintiff. As the reasons stated dispose of this application, we have not deemed it necessary to consider the matter of prejudice.

The application for the writ is denied, and the proceeding dismissed.

Dismissed.

BRADSHAW V. STATE.

44 Texas Crim. Rep. 222—70 S. W. Rep. 215.

Decided October 29, 1902.

PRACTICE—IMPEACHMENT—INSTRUCTIONS—ALIBI: *Remarks of the judge that certain testimony might not be res gestae, but corroborating testimony, error—Competency and weight of impeaching testimony—Instructions assuming facts—Effect of plea of not guilty—Alibi instruction assuming the commission of the alleged crime.*

1. The defendant objected to proof of statements of the prosecuting witness made subsequent to the robbery, as not being part of the *res gestae*, and, the court remarked, that it might not be part of the *res gestae*, but was admissible as corroborating testimony. *Held*,—error.
2. The question as to whether an impeaching witness, who could not positively say, but thought, he knew the reputation of the assailed witness, was competent, is not directly passed upon.
3. While one witness alone may not be sufficient to impeach another, yet, that is a question as to the weight and not a test of competency.
4. A plea of not guilty, put at issue all the matters of fact. When instructing the jury, the court should be very careful, not to assume any fact against the accused, of which there may be a possible controversy.
5. In instructing the jury as to an *alibi claimed*, it was error for the court to assume that the alleged crime was committed.

Court of Criminal Appeals of Texas.

Appeal from District Court, Ellis County; Hon. J. E. Dillard, Judge.

Sam Bradshaw, convicted of crime, appeals. **Reversed.**

Robert A. John, Assistant Attorney-General, for the State.

HENDERSON, J. Appellant was convicted of robbery with

firearms, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

Bills of exceptions Nos. 1 and 2 object to the testimony of Tom Dixon as to what appellant may have told him concerning the robbery a short time thereafter. Bill No. 1 shows that prosecutor, Will Chapman, testified that he was robbed on Saturday night by Sam Bradshaw and Larry Mills. He went from the place of the robbery in a trot to Negro Town, and found Tom Dixon, and took him and showed him which way they went. In going from where he was robbed to where he found Dixon, he met a negro, and inquired where he could find Dixon; "don't know how far it was" from where he was robbed to where he found Dixon, but guessed it was a mile. The State first introduced Will Chapman, who testified, and then introduced Tom Dixon, who stated, in effect, that appellant found him on the night of the alleged robbery at a negro dance; that, when he went to where prosecutor was, he was crying; he then went with him about 400 yards, and showed the officer where he was robbed, and which way the parties went. "He told me at the dance-house that he had been robbed." Which testimony of the witness Dixon that Chapman told him at the dance-house that he had been robbed was objected to by the appellant on the ground that it was not *res gestæ*, but was hearsay, whereupon the judge remarked, in the presence and hearing of the jury, that probably the evidence was not admissible under the rule of *res gestæ*, but might be admissible as corroborating evidence. Appellant objected both to the testimony and the remarks of the judge. If it be conceded that under some of the authorities the testimony as to what prosecutor told Tom Dixon might be considered *res gestæ*, yet we do not believe the remark of the judge as to the reason of its admissibility was authorized. Certainly there is no rule of law which authorizes the admission of testimony simply because it is corroborative of other testimony. The remark of the judge not being justified, we cannot say that it was not calculated to injure appellant's rights before the jury, inasmuch as they were thus informed that, in the opinion of the judge, this testimony corroborated and re-enforced the testimony of the prosecutor in an important particular. *Stayton v. State*, 32 Tex. Cr. R. 33, 22 S. W. 38;

Chalk v. State, 35 Tex. Cr. R. 116, 32 S. W. 534; *Price v. State*, 35 Tex. Cr. R. 501, 34 S. W. 622; *Kirk v. State*, 35 Tex. Cr. R. 224, 32 S. W. 1045.

Appellant proposed to impeach the witness George Coleman for truth and veracity by Robert Winbush. In laying the predicate for such impeachment, the witness stated that he could not say that he knew Coleman's general reputation for truth in the community in which he lived, but that he thought he knew it. The Assistant Attorney-General contends that this predicate was not sufficient; that the witness disclosed the fact that he was not certain that he was acquainted with the reputation of said Coleman, and that consequently he could not prove by the witness such reputation; and, furthermore, that appellant only offered the one witness upon this issue, and it was not competent to impeach a witness by the testimony of a single witness. We know of no case in which the exact question here presented is decided. Of course, the authorities hold that the witness must know the general reputation as to the particular characteristic before he is authorized to speak as to that matter. *Holbert v. State*, 9 Tex. App. 219, 35 Am. Rep. 738. We take it that on another trial of this case the witness may be further examined in order to ascertain definitely whether or not he has sufficient knowledge to speak as to the reputation of the witness proposed to be impeached. In *Rider v. State*, 26 Tex. App. 334, 9 S. W. 688, it appears to be held that one witness is not sufficient to impeach another witness, as it is simply oath against oath. We do not, however, understand the authorities to hold that one witness cannot be introduced on this question, leaving the matter of credibility, along with the other testimony in the case, to be determined by the jury. *Butler v. State*, 3 Tex App. 48.

Appellant excepted to the charge of the court on various grounds—among other things, that the charge did not submit to the jury, in its application of the law to the facts, the question of ownership and want of consent of Will Chapman to the taking of the property. An inspection of the charge supports this contention. While there are some cases which hold that where some fact is not controverted, but admitted, the court may in the charge assume the fact to be so, yet these are special instances, in which there was clearly no controversy as to the fact assumed; the proof being all one way on

the question, or the fact distinctly admitted. Ordinarily the plea of not guilty brings in issue every inculpatory fact, and the court should be careful not to assume against appellant any fact about which there might be any possible controversy. We believe the court's charge in this respect is subject to the criticism of appellant. The same observations made above are also applicable to the court's charge on *alibi*. An inspection of that shows the court assumed the commission of the robbery by some one, and then proceeds to charge on *alibi*.

For the errors pointed out, the judgment is reversed, and the cause remanded.

STATE V. SIMPSON.

133 N. C. Rep. 676—45 S. E. Rep. 567.

Decided October 27, 1903.

PRACTICE: *When, self-criminating testimony given in another case may be received in evidence—Two jointly indicted for adultery and fornication; evidence competent against one but not competent against the other; acquittal of one and conviction of the other; conviction sustained.*

1. Appellant, and a woman, were jointly indicted for fornication and adultery. On a previous occasion, in a criminal prosecution instituted by appellant against one Reed, the appellant after being first informed by the magistrate, that he need not criminate himself, testified that he had been intimate with Reed's wife. On an other occasion, when he was a defendant in a prosecution before a magistrate for burglary and was there represented by counsel and was informed by the magistrate that he need not criminate himself, he testified as to the cause of his presence on the night of the burglary, which testimony was taken in writing and signed by him. *Held*, that his testimony of each of these previous occasions was properly introduced against him.
2. The above admissions not being competent against the *feme* defendant, she was, under the instructions of the court, acquitted; but the jury found the appellant guilty. He moved in arrest of judgment, contending that after her acquittal judgment could not be entered against him. *Held*, as the criminating evidence was competent against him, but was not competent against her, she could be acquitted and he convicted.

Supreme Court of North Carolina.

Appeal from Superior Court, Union County; Hon. C. M. Cooke, Judge.

Joseph Simpson and Amanda Reed were jointly indicted for fornication and adultery, and were tried at the August Term, 1903. She was acquitted; but he was convicted. He appealed. Affirmed.

Robert D. Gilmer, Attorney General, and *Redwin & Stack*, for the State.

R. W. Lemmond, for the appellant.

CONNOR, J. The defendant appellant was, together with Amanda Reed, charged with fornication and adultery. From the judgment of the court following a conviction, he prosecutes this appeal, and assigns errors in the rulings of his honor.

Exception 1. The defendant took out a warrant before M. L. Flow, a justice of the peace, charging Isaiah Reed, the husband of his co-defendant, Amanda, with an assault. He was examined as a witness for the State in the trial before the justice, and upon such examination made certain statements which tended to show habitual illicit intercourse with the *feme* defendant. The justice of the peace (Flow) was introduced by the State upon the trial of this cause, and asked in regard to such statements. The defendant objected. Thereupon the court examined the witness respecting the examination of the defendant. Upon such examination the justice of the peace testified that he informed the defendant that he need not answer any question which would criminate him, and that he made the statements voluntarily. His honor overruled the defendant's objection, and to this ruling, and the answers to the questions asked the witness, the defendant excepted. The answers tended to show admissions by the defendant of habitual criminal intercourse with his co-defendant. The exception cannot be sustained.

This court has uniformly held that testimony given by a defendant when examined as a witness at his own request is admissible against him on another hearing or trial for the same or any other offense. Such admissions and declarations do not come within either the language or the reason of section 1145 of the Code. *State v. Ellis*, 97 N. C. 447, 2 S. E.

525. Certainly, when the defendant goes upon the stand as the prosecutor in an investigation being had upon a warrant sworn out by himself, he cannot claim such indemnity as a defendant who is examined under the provisions of section 1145. If, however, there were any force in the exception for the reason assigned, it is met by the fact that he was notified that he need not give in testimony tending to criminate himself. While it was not necessary that his Honor should find the fact that the declarations were voluntary, we think that such is the reasonable construction of the record. The justice was examined at some length upon this point, and thereupon the defendant's objection was overruled. *State v. Efler*, 85 N. C. 585.

Exception 2. The defendant was upon trial before J. A. Cloutz, a justice of the peace, upon a charge of burglary, and was sworn as a witness in his own behalf. The justice was asked whether the defendant was notified that he need not testify to any facts tending to criminate him, and answered in the affirmative, saying, "He made this statement voluntarily in his own defense, to show the cause of his being in there that night." The testimony was taken down according to agreement between counsel. His Honor admitted the written testimony signed by the defendant, to which he excepted. We are of the opinion that his Honor's ruling in this respect was correct. The defendant testified in his own behalf, as he was entitled to do by section 1353 of the Code, and his testimony taken in writing and signed by him is clearly admissible against him. *State v. Ellis, supra*. In this respect this case is distinguished from *State v. Parker*, 132 N. C. 1014, 43 S. E. 830. Mr. Justice Walker in that case clearly says that the examination of the defendant was had pursuant to section 1145, and that the simple statement that the witness "was cautioned" was not sufficient to enable the court to find that the provisions of the section for the protection of the defendant was complied with. In this case it is stated that the defendant, "being duly sworn, testified," etc. It appears that he was represented by counsel before the justice of the peace, and we must assume that appropriate language is used to describe what was done. The fact also appears that he was expressly notified that he need not testify to incriminating

facts. The exception cannot be sustained. This ruling disposes of the fifth exception.

His Honor instructed the jury that there was no evidence proper to be considered by them against the *feme* defendant, and submitted the question of the guilt or innocence of the male defendant under proper instructions. The defendant did not ask for any special instructions. After verdict of guilty, he made a motion in arrest of judgment. In this court the defendant's counsel contended that for this offense, upon the acquittal of one of the defendants, no judgment can be rendered against the one convicted. This was decided in *State v. Mainor*, 28 N. C. 340, and was held as law in this State until doubted in the opinion of Mr. Justice Davis in *State v. Rinehart*, 106 N. C. 787, 11 S. E. 512. The question came before the court again in *State v. Cutshall*, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599, when it was held that an acquittal of one defendant did not work the same result as to the other, or prevent the court from rendering judgment. This result, when first suggested, seems illogical, but for the reasons given in *Cutshall's Case*, and upon the authorities cited, we think it is correct. It is evident that, under the peculiar and yet proper provision in section 1041 of the Code, the admissions of a defendant, while competent against the one making them, are not competent against the other; a case may, as in this record, be fully made out against one, and not against the other. *State v. Ballard*, 79 N. C. 627. A verdict based upon such testimony would, as to the defendant not affected by the admissions, practically be, "Not proved." The action of his Honor in this case was based upon this principle. He simply decided that there was no evidence against the *feme* defendant. *State v. Lawson*, 123 N. C. 744, 31 S. E. 667, 68 Am. St. Rep. 844. It would work a strange result if, as in this case, the male defendant could openly admit habitual illicit intercourse with a woman, and defy the law because there was no competent evidence against her. We concur in the observations of Davis, J., in *Rinehart's Case*, *supra*, which were adopted by this court as the law in *Cutshall's Case*, *supra*. The testimony coming from the male defendant in this case shows a state of lascivious conduct on the part of the *feme* de-

fendant, a married woman, and the male defendant, justifying the very judgment of his Honor.

No error.

DOUGLAS, J., dissents.

KELLY v. STATE.

Tex. Crim. Rep.—66 S. W. Rep. 774.

Decided February 4, 1902.

PRACTICE—APPEAL—DEATH OF APPELLANT: *Status of sureties on appeal bond.*

In a criminal case, the death of the appellant pending an appeal, abates the prosecution from which the appeal was taken.

Court of Criminal Appeals of Texas.

Appeal from Johnson County Court; Hon. W. D. McCoy, Judge.

E. T. Kelly, convicted of crime, dies pending his appeal, and his appeal being dismissed at a prior term the dismissal set aside and action dismissed.

Goldsmith & Walker, for the appellant.

Robert A. John, Assistant Attorney General, for the State.

Brooks, J. At a former day of this term the appeal in this cause was dismissed and abated on account of the death of appellant, and the judgment of this court provided "that appellant, E. T. Kelly, as principal, and J. D. Goldsmith and J. W. Floore, as sureties on his recognizance, pay all costs herein incurred in this court, and that this decision be certified below for observance." Since the dismissal of this cause the sureties by attorney have filed a motion to reform the judgment, and absolve them from any liability on the principal's bond, on the ground that appellant died on the 7th day of November, 1901, before the cause was submitted to this court or action of any kind taken thereon. This motion is sustained by proper affidavits. And appellant cites us to *March v. State*, 5 Tex. App. 450, in which the court says: "In a criminal prosecution, when the accused has taken an appeal in the manner

prescribed by law, the proceeding is still pending and undetermined until the appeal shall have been decided, and that, in case the appellant die whilst the appeal is pending and undetermined, the prosecution or the criminal action does not survive, but, on the death of the appellant pending the appeal, the prosecution abates in toto, whatever be the judgment appealed from." This case is directly in point, and sustains appellant's contention. It is therefore ordered by this court that the judgment heretofore rendered in this cause be reformed, and that the sureties above named, together with appellant, be in all things released and relieved from any and all costs that have or may accrue by virtue of the prosecution.

STATE V. KING.

174 Mo. 647—74 S. W. Rep. 627.

Decided May 19, 1903.

PRACTICE—EXAMINATION OF JURORS—ALIBI—ARGUMENT OF COUNSEL—EVIDENCE OF GUILT SHOULD BE CLEAR—TESTIMONY OF CO-INDICTEE UNWORTHY OF BELIEF—ORDERED THAT THE DEFENDANT BE DISCHARGED, BECAUSE OF INSUFFICIENT EVIDENCE.

1. A defendant on trial is not required to make out the defense of *alibi* beyond a reasonable doubt. If the testimony is of such a character as to raise a reasonable doubt in the mind of the jury as to his presence at the time of the commission of the crime, that is all the law requires.
2. A liberal latitude should be given the defendant in the examination of the panel of jurors on their *voir dire*.
3. A co-indictee had on the previous day been tried and convicted as a party to the same larceny and burglary for which defendant was being tried, and one of the veniremen testified that he had heard his testimony and two others that they had heard his and that of two officers; but all three were retained as members of the trial jury. *Held*, that they could not be the judge of their own impartiality, and that the court should not have confined defendant on their *voir dire* examination to a simple inquiry of whether or not they had formed from hearing that testimony an opinion of defendant's guilt or innocence, but he had a right to the impressions made on their minds thereby.
4. It is highly improper for the prosecuting attorney in his argument to the jury to refer to the defendant as "an ex-convict" without any proof upon which to base it.

5. For the support of the verdict finding defendant guilty of larceny and burglary, the State relies largely on the testimony of a co-indictee, who on the day previous to the trial had been convicted, and who at the trial said that the other two co-indictees urged him on the night the crime was committed to go with them and rob the tailoring shop, and when he refused they said they were going anyhow, and four suits of clothes and other things were stolen, and these were found, not in the possession of defendant, but in that of this witness, and the third co-indictee, and the evidence further shows that the witness and defendant had had a difficulty and certain letters introduced by the State as having been written by defendant to the witness, disclose no acknowledgment of guilt, but an effort to reconcile a man whom he feared was about to do him some injustice in connection with the crime. *Held*, that the witness was unworthy of belief, and the defendant should be discharged.
6. Defendants should not be convicted upon mere suspicion of guilt or even strong probabilities of guilt; to warrant their conviction, the testimony, when the whole is considered, should be clear and convincing, entirely satisfying the minds and consciences of the jury.

Supreme Court of Missouri.

Appeal from Criminal Court, Jackson County; Hon John W. Wofford, Judge.

John B. King, convicted of burglary, appeals. Reversed.

Phil D. Clear, for the appellant.

Edward C. Crow, Attorney General, and *C. D. Corum*, for the State.

Fox, J. On the 27th day of March, 1902, the prosecuting attorney of Jackson County, Missouri, filed an information in open court charging the defendant, Charles Golden and Raymond Burns with the offense of burglary and larceny.

It was alleged that on the 5th day of January, 1902, the defendants broke into and entered a tailor shop of one Joseph Topping, and that they stole four pairs of pants and one coat which were found in said shop, and which were in the custody of said Topping. The defendants were duly arraigned, and on the application of defendant Burns a severance was granted, and the State elected to first try the defendant Burns. He was tried and convicted. Afterwards, upon a trial had upon an issue joined between the State and this appellant, John B.

King, he was found guilty, and sentenced to imprisonment in the penitentiary for a term of six years.

After having his motion for new trial overruled, he duly appealed from the judgment of conviction. It is conceded by both the State and defendant that the body of the crime—the burglary and larceny—was fully established by the evidence.

The State in this case relied chiefly upon the testimony of Burns to support the verdict against this defendant. It must be remembered that Burns, the principal witness for the State, was jointly indicted with the defendant in this cause, and was tried the day before this case was tried, and convicted. That part of Burn's testimony which undertakes directly to connect this defendant with the burglary and larceny charged is as follows:

"Q. When did you see King and Golden next? A. I seen them Sunday evening—Sunday evening about 10:30 or 11 o'clock.

"Q. Where? A. At the Cosy Restaurant."

"Q. Where is that? A. That is between Main—or between Walnut and Grand avenue on Thirteenth street.

"Q. How near is that to the southwest corner of Thirteenth and Main? A. I should judge, about a block and a half.

"Q. What did you do there in the restaurant? A. Why, I was in there eating lunch when those two gentlemen came in.

"Q. When King and Golden came in? A. Yes, sir.

"Q. Did you meet them outside afterwards? A. Yes sir.

"Q. Where did you go? A. We went to the corner of Grand avenue and Thirteenth street, and had a couple drinks there, and from there we went to Thirteenth and Main streets.

"Q. What corner? A. Why, it is the south—the southwest corner.

"Q. Southwest corner of Thirteenth and Main. A. Yes, sir.

"Q. Is there a saloon there? A. Yes, sir.

"Q. How near is that to Topping's tailoring shop—to 3 West Thirteenth street? A. That would be about four or five doors, I would judge.

"Q. How long did you stay there in that saloon? A. Probably twenty-five or thirty minutes.

"Q. What time did you get out from there? A. Well, I should judge, right close about 12 o'clock.

"Q. Well, now, after you came out of the saloon I will ask you to tell the jury whether this defendant, King, and Golden at that time asked you to go in with them and burglarize this store? A. Why, they spoke about it; yes, sir.

"Q. What did they say? A. Well, they wanted me to go—wanted to know if I wanted to go into some tailor shop. I didn't know at the time where this tailor shop was at. They wanted to know if I wanted to go in and get some clothes, and I told them no, I did not. We had a few words about it, and I told them I wouldn't have nothing to do with it, and they said they was going anyway.

"Q. Who said? A. King and Golden.

"Q. Now say what each one said. Did they both say it, or just one? A. If I remember right, they both said it.

"Q. Where did you leave them? A. I left them on the corner of Thirteenth and Main street.

"Q. What time of night? A. I should judge it was a little after twelve o'clock.

"Q. What did King say, if anything, when you left? A. He says, 'Burns will talk around about it, about doing anything, and, when you come to do it, he won't do it;' and I told him I wouldn't have anything to do with it.

"Q. Were there any skeleton keys or burglar tools there? A. Why, I am not positive. I think this man Golden said he had a key he could open the door with."

Robert E. Phelan, who was connected with the police department, was introduced by the State. He arrested all three of the defendants, who were jointly indicted. They were at different places when they were arrested. Phelan further stated that, when he arrested King, King stated he did not know anything about the burglary, and the record discloses that he at all times denied having any connection with it. This police officer says he found the goods stolen at the time of the burglary in the possession of Burns and Golden. He does afterwards say that this defendant was in possession of the goods, but this statement is explained, which clearly indicates that defendant was not in the possession of the stolen goods. The record further discloses that all of these defendants—Golden, Burns, and King—after they were arrested,

had a preliminary hearing. At this examination it further appears that defendants Golden and Burns did not testify, but that King did testify as a witness. It is also disclosed that Burns and King had a difficulty or a fight. It is insinuated that this resulted from King's refusal to testify in Burn's behalf. However, it does not clearly appear as to what occasioned the fight between King and Burns, but it does appear from Burn's own statement that they had a difficulty.

The following letter was introduced by the State, marked "Exhibit A":

"Dear Friend Ray—Now here is what you want to send to Hadley if you want to do the right thing and be a man with me, for I am certainly going to stick with you Burns as sure as there is a God in heaven—you know I can make \$2.50 a day linework right here in K. C. and you know also I can go the other route—R. R. train service anything that good coin is connected with—I'll show you that there is one ☐ man among so many dirty bastards. I been used to rambling with ☐ people all my life and don't do anything else and when I say I will do anything I'll do it if its in my power or if any one else can do it for I will go together with a Buzz saw one time in a case like that. Now I tell you Ray this is the right way and only way for us both to go by this & escape the big House. You know there's no evidence against me & I can't be convicted so there's no use for us to do time or buck each other for it will ditch us both.—Now Ray do this and you know you are doing the square & right thing for a friend & a man that will stick. [Signed] J. B. King."

There were two other letters introduced, one by the defendant and one by the State, marked "Exhibit C and D." These letters were introduced as being explanatory of letter marked "Exhibit A." Witness Burns admits that he sent these letters to the prosecuting attorney. All of these letters, if written by this defendant, as testified to by Burns, may be susceptible of inferences indicating that defendant may have had some connection with the offense charged. The most that can be said of them is that they create a suspicion against him. This is substantially the testimony upon which this conviction is based.

On the part of the defendant, he testified in his own behalf. His statements as a witness were consistent and in harmony with what he had stated to the officers when questioned on this

subject. Upon the defense of an *alibi*, interposed by defendant, numerous witnesses were introduced. While this testimony was not so clear and convincing as to establish his absence from the place of the commission of the crime beyond a reasonable doubt, yet it was a reasonable fair showing, by witnesses who were laboring men and not impeached. He was not required to make out this defense beyond a reasonable doubt, but, if the testimony was of such a character as to raise a reasonable doubt in the mind of the jury as to his presence at the time of the commission of the offense, this was all the law required.

Our attention is first directed to the error complained of in the impaneling of the jury to try this cause. It appears from the record that three of the jurors presented for examination on their *voir dire* (Coleman, Myers, and Haman) were in the courtroom the day before, when Burns was tried and convicted of the offense charged against this defendant; that they heard a part of the testimony against Burns. That we may fully comprehend this examination, we will here quote from the record in respect to this examination: "Upon the examination of the jurors for qualification, the following questions were asked of Juror J. W. Coleman:

"By Mr. Riggs: Q. Were you in court yesterday during the trial of Burns? A. I was here a while.

"Q. How many witnesses did you hear testify? A. I heard part of Burn's talk.

"Q. Part of Burns' talk? A. Yes, sir.

"Q. Did you consider it only talk, or testimony? By the Court: Oh, don't mind about that. A. Well, you can have it talk or testimony—either one.

"Q. Well, from what you heard, did you form any impression or opinion whether a burglary had been committed or not?

"By Mr. Hadley: I object to that, your honor.

"By the Court: I don't think that is the question. The question is, did you form any opinion from what you heard as to the guilt or innocence of John B. King? A. No, sir.

"(To this ruling of the court the defendant then and there duly excepted, and still excepts.)

"By the Court: Is your mind perfectly impartial between the State and the defendant? A. Yes, sir.

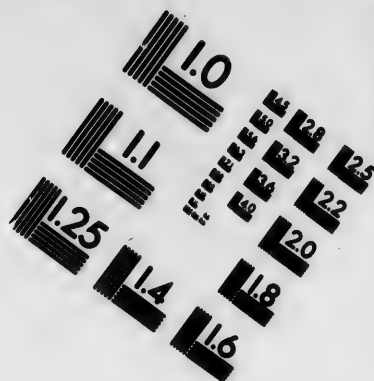
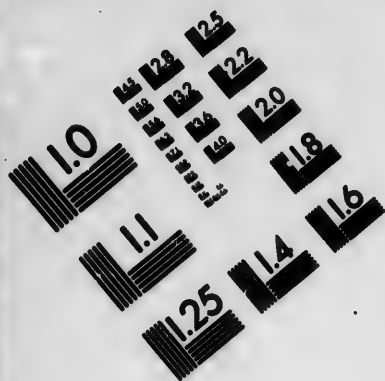
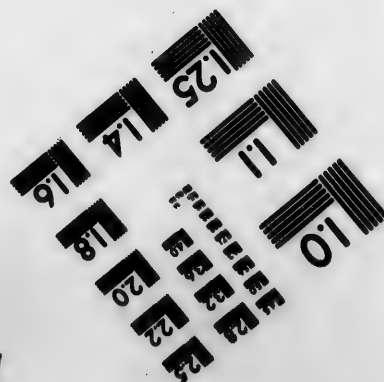
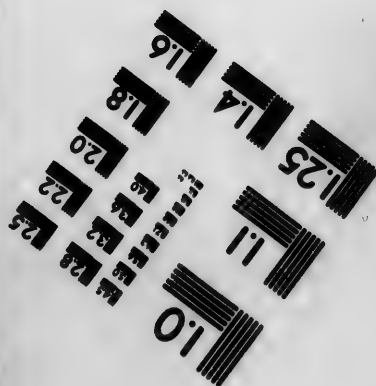
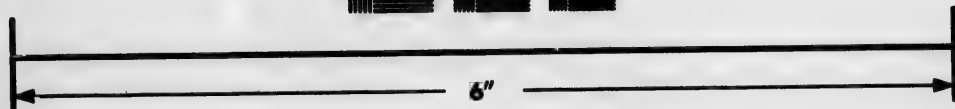
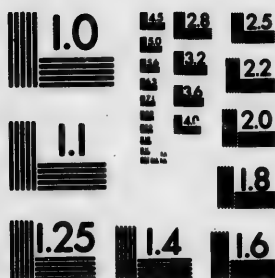


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"Q. Did you form any impression or opinion whether any larceny had been committed or not?

"(Objection by the State sustained, to which ruling of the court the defendant then and there duly excepted, and still excepts.)

"By Mr. Riggs: I understand that that same question ought not to be put to any other jurors?

"By the Court: I hold it is improper to ask whether they have formed an opinion as to whether larceny was committed or not, or whether burglary was committed or not. You can ask them the question as to whether they have formed an opinion from any source at all as to the guilt or innocence of John B. King, and if their minds are perfectly impartial between the State and John B. King, and if they can hear the evidence and render a fair and impartial verdict between the State and the defendant; but I don't hold you to those questions I have asked, at all, but I say they are proper questions to ask.

"(To this ruling of the court the defendant then and there duly excepted, and still excepts.)

"In the examination of Juror J. B. Myers, the following questions were asked, and rulings made:

"Q. Were you in the court yesterday during the trial of Burns? A. Part of the time.

"Q. You heard part of it? A. Yes, sir.

"Q. Which witnesses were testifying? A. Why, there was three of them—two officers and the defendant.

"Q. Now, from the testimony given by the officers and the testimony given by the defendant on the trial of Burns, did you form any impression or opinion concerning the facts which these officers and Burns testified to?

"By the Court: You needn't answer that question.

"To this ruling of the court the defendant then and there duly excepted, and still excepts.

"In the examination of Juror J. B. Haman, the following questions were asked, and rulings made:

"Q. Were you in court yesterday during the trial of Burns? A. Yes, sir.

"Q. How many witnesses did you hear testify? A. Heard the two officers and part of Burns' testimony.

"Q. And you heard what they testified to? A. Yes, sir.

"Q. From so much of the testimony as you heard did you

form any impression or opinion concerning the facts which they testified to?

"By the Court: You needn't answer that question.

"To this ruling of the court the defendant then and there duly excepted, and still excepts."

It will be observed that these jurors were present at least part of the time the day before in the trial of defendant Burns for the same offense this defendant was being tried. They heard part of the testimony. Defendant had the unquestioned right to have a panel of impartial and qualified jurors from which to make his challenges. The testimony in the case of Burns involved material questions in the trial of this defendant. The identical burglary and larceny was being inquired about, and, in addition, the identity of the stolen property was a subject of inquiry, all of which were involved in this case. Conceding, for the purposes of this case, that the answers to the questions propounded would not have furnished sufficient grounds for a challenge for cause, to enable him to intelligently determine his peremptory challenges, defendant clearly had the right to ascertain by appropriate questions, the influence the hearing of the testimony in the Burns case had upon the minds of the panel of jurors from which he was to make his challenges. In the case of *State v. Mann*, 83 Mo. 589, this subject is very ably and fully discussed, and, after a very exhaustive review of all the cases, the court announced the very just and appropriate rule which should be adopted under our statute—that "a liberal latitude should be allowed in the examination of the panel of jurors on their *voir dire*." In the case of *State v. Foley*, 144 Mo. 600, 46 S. W. 733, the court discusses fully the question of competency of jurors. The juror, in that case, stated upon his examination that he could give the defendant a fair trial, but he further stated that he was present at the first trial of the defendant, and had formed an opinion. The court very properly held that the juror could not be the judge of his own disinterestedness, and that it was error in the trial court to accept him as one of the panel. It may be true that the mere fact of hearing a part of testimony in the Burns case would not disqualify the jurors. But we think it was very pertinent for defendant's counsel to propound the questions as heretofore quoted, with the view of ascertaining, first, as to their competency; secondly, it was a legitimate inquiry for the

purpose of intelligently determining his challenges. The fact that a burglary and larceny had been committed, and the identity of the stolen property, were as material in the trial of this defendant as they were in the trial of Burns, and the defendant had the right to ascertain the impressions of the jurors from hearing this testimony, and it was error to refuse an examination on the part of the defendant on that subject.

It is next insisted that error was committed by the trial court in not rebuking the prosecuting attorney on account of improper remarks made in his closing address to the jury.

The remarks of the prosecuting officer, the exceptions, and remarks of the court are disclosed by the record as follows:

"We except to the remark of the prosecutor that Burns testified that he, the defendant, and the other man named in the indictment had concocted the scheme in the restaurant of robbing Topping's place.

"I want to object to the remark of the prosecuting attorney that 'the defendant is an ex-convict.'

"(By Court: That's improper.) It is improper.

"I desire to except to the remark of the prosecuting attorney in referring to the defendant as 'other burglars.'"

There was on the part of the State an extremely earnest effort to show that the defendant had been a convict in the penitentiary of Illinois. We have carefully examined the efforts of the State in this respect, and we take it that it must be conceded that there was no competent proof establishing that fact. It was highly improper, on the part of the prosecuting officer, after failing to prove this fact, to refer to the defendant as an ex-convict, without any proof upon which to base it. Representatives of the State, in their efforts to preserve the dignity of the Commonwealth, should be commended for their zeal and earnestness; but, on the other hand, they must not be so blinded by their desire for conviction as to lose sight of the rights of the defendant.

The defendant is entitled to a fair and impartial trial, and this reference to him before the jury was unwarranted by the proof, and should have been condemned in language by the court sufficiently strong to have destroyed any injurious effect it may have had in this trial.

It may be that the character of the criminal classes in the

large cities, with which prosecuting officers are required to deal, is a sufficient apology for the tendency of this record, disclosing, as it does, an effort to convict, right or wrong; but it must not be forgotten that the rules of law and proper criminal procedure are applicable alike to all subdivisions of the State.

This brings us to the last and most important question in this case: Is the testimony in this cause sufficient to support the verdict?

The Attorney General, in this statement preceding the points and authorities, says: "It seems to us that the case was fairly tried, but we feel it incumbent upon us to say that the evidence to sustain this verdict is not entirely satisfactory to our minds, and we wish to invite a careful consideration of the testimony by this court."

This, supported by the doubtful expressions of the learned trial judge, when the demurrer was offered to the evidence at the close of the State's case, where he says, "I believe I will let it go to the jury," particularly invites our attention to the testimony upon which this defendant was convicted.

For the support of the verdict in this case, we must look chiefly to the testimony of Burns. We must absolutely believe what he says is true, and then, in addition, must indulge in the presumption that defendants King and Golden went and committed this burglary and larceny. Burns says that about 12 o'clock at night he, Golden, and King were together near the place of the burglary. Golden and King wanted him to go with them. He would have nothing to do with it, and "they said they were going anyway."

It will be observed that he swears that he had nothing to do with this burglary, yet he and Golden were found in the possession of the stolen goods; and, the day before this case was tried, 12 jurors flatly contradicted this statement, for they found him guilty of the burglary, as charged.

The State occupies rather a novel position as to this witness Burns. He is introduced by the State as its chief witness, and ordinarily a party introducing a witness vouches for his truth and veracity, yet the State is compelled to admit that the portion of Burns' testimony that he had nothing to do with this burglary is absolutely false. This is the only position to be

taken, for doubtless the day before the prosecuting attorney insisted that he was present and did participate in the burglary. We are then confronted with this position: Burns' testimony is all false, except that part which connects this defendant with this offense; and that testimony, the State contends, is absolutely true. Viewing all the testimony in this case—that Burns and Golden were found in possession of the stolen goods, that a jury convicted the defendant Burns, and that no part of the stolen property was found in the possession of this defendant—we are of the opinion that Burns' testimony is unworthy of belief. As to the letters which Burns says this defendant wrote, and requested them sent to the prosecuting attorney, while inferences may be drawn from them unfavorable to defendant, yet they contain no admissions of guilt; and, furthermore, it must be noted that the testimony discloses that Burns and this defendant had a difficulty, and these letters, if written by this defendant, are but an effort to reconcile a man with whom he had a difficulty, and whom he feared would do him some injustice. However, you can give them their worst construction, and they create but mere suspicions of guilt on the part of this defendant.

Viewing all the testimony in this cause, it is apparent that it is not that clear and convincing proof of the guilt of the defendant which authorizes his conviction. Its tendency, at most, is only calculated to create a suspicion that he was implicated in the commission of the offense. Defendants should not be convicted upon mere suspicions of guilt, or even strong probabilities of guilt. To warrant their conviction, the testimony, when all considered, should be clear and convincing, entirely satisfying the minds and conscience of the jury.

This defendant may be guilty. If so, the testimony fails to show it satisfactorily; and, if he is, it is better that he escape, than to make a precedent that must be general in its application of the guilty and innocent alike.

Entertaining the views as herein expressed, the judgment will be reversed and the defendant discharged.

All concur.

PEOPLE v. ELLIOTT.

172 N. Y. 146, 60 L. R. A. 318—64 N. E. Rep. 837.

Decided October 7, 1902.

PROCEDURE: *As to the testimony of a deceased witness, taken at a previous trial—Unconstitutional methods of the prosecution denounced.*

1. Although the New York statute entitled, The Bill of Rights, grants to the accused the right "to meet the witnesses against him face to face," and the Code of Criminal Procedure does not expressly authorize the introduction of testimony of deceased witnesses, yet by virtue of the Code of Civil Procedure, in the trial of a criminal case, the testimony of a deceased witness, given by him in a former trial of the same case and on the same issue, and in the presence of the accused, may be received in evidence against him.
2. Several decisions on the same general subject reviewed.
3. Methods of procuring evidence on part of the prosecution denounced.

Court of Appeals of New York.

Appeal from Supreme Court, Appellate Division, Third department.

Frank P. Elliott, convicted of crime, and from a judgment of the Appellate Division (73 N. Y. Supp. 279) affirming the conviction, he appeals. Affirmed.

John P. Wheeler, for the appellant.

Wordsworth B. Matterson, for the People.

BARTLETT, J. This defendant has been twice tried. The judgment of conviction at the first trial was reversed by this court. (163 N. Y. 11, 57 N. E. 103.) At the second trial a judgment of conviction was entered upon the verdict of a jury, which, on appeal, was affirmed by the Appellate Division, and we are now called upon to pass on that determination.

The learned counsel for the defendant presents three grounds for the reversal of this judgment: Error in challenging the jury; failure of the trial judge to follow the decision of this court on the first appeal in charging the jury; the admission

of the testimony of Dr. Brooks, who was dead at the time of the second trial.

The Appellate Division decided that none of these grounds presented reversible error, and we are of the same opinion, but deem it proper to further consider the question whether Dr. Brooks' testimony was properly read on the second trial.

The Code of Criminal Procedure (section 8, subd. 3) provides that in a criminal action the defendant is entitled "To produce witnesses in his behalf, and to be confronted with the witnesses against him in the presence of the court, except that where the charge has been preliminarily examined before a magistrate, and the testimony reduced by him to the form of a deposition in the presense of the defendant, who has, either in person or by counsel, cross-examined, or had an opportunity to cross-examine, the witness, * * * the deposition of the witness may be read upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found in the State."

There seems to be no provision of the Code of Criminal Procedure authorizing, in terms, the reading on a second trial of the testimony of a deceased witness sworn at the first trial.

The Code of Civil Procedure (section 830) provides as follows: "Where a party or a witness has died * * * since the trial of the action, * * * the testimony of the deceased, * * * taken or read in evidence at the former trial or hearing, may be given or read in evidence at a new trial or hearing, or upon any subsequent trial or hearing, of the same subject-matter in an action * * * between the same parties who were parties to such former trial or hearing or their legal representatives, by either party to such new trial or hearing or to such subsequent action, * * * subject to any other legal objection to the competency of the witness, or to any other legal objection to his testimony or any question put to him. The original stenographic notes of such testimony taken by a stenographer, who has since died or become incompetent, may be so read in evidence by any person whose competency to read the same accurately is established to the satisfaction of the court, * * * presiding at the trial of such action. * * *

The section quoted refers to the death of a witness after the trial of an "action."

Section 3333 of the Code of Civil Procedure defines "action" as follows: "The word 'action,' as used in the New Revision of the Statutes, when applied to judicial proceedings, signifies an ordinary prosecution, in a court of justice, by a party against another party, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."

This definition renders it clear that section 830 of the Code of Civil Procedure, above quoted, refers to both civil and criminal actions.

Section 8 of the Code of Criminal Procedure provides that the defendant shall be confronted with the witnesses against him in the presence of the court. This is merely a re-enactment of the Bill of Rights, which provides, in section 14, that the accused shall be confronted with the witnesses against him. (2 Rev. Stat. [Bank's ed.] 1651.) The Constitution of this State, unlike the Federal Constitution, has no similar provision.

The question has been much discussed whether the reading of testimony, reduced to a deposition in a preliminary examination, where the accused was represented by counsel and exercised the right of cross-examination, or testimony taken at a former trial, where the deponent or witness was dead at the time of the subsequent trial, could be read in evidence. It has also been matter of discussion whether the precise testimony taken at a former trial should be read in evidence from the minutes, or, in case of their destruction, the substance thereof given by a witness who heard the testimony delivered at the first trial.

In the case of *People v. Williams* (35 Hun. 516) the question of the constitutionality of section 8, subd. 3, of the Code of Criminal Procedure, was under consideration. Judge Daniels said (page 518): "It is manifest from the authorities permitting the deposition or evidence of a deceased witness to be read upon a trial of the accused that it has not been deemed essential that he should be confronted by the witness against him upon the trial itself; but if the evidence be taken in the course of the proceeding in his presence, and with the right or privilege of cross-examination secured to him, that will be sufficient to allow the deposition to be read, in case of the decease of the witness making it, between the time when

it may be taken and the time of the trial. And if this article of the Constitution should be held to be applicable to the case, it would not, therefore, exclude the deposition received in evidence on trial of the defendant."

The Constitution here referred to is the Federal Constitution, for, as already observed, the State Constitution has no provision for the right of confrontation.

In *People v. Penhollow* (42 Hun. 103), it appeared that a witness on the part of the People at the first trial of this indictment was dead at the time of the second trial, and the District Attorney offered to read in evidence her testimony as previously given. To the reception of this proof the defendant objected on the ground that it was incompetent and unconstitutional, being in violation of the sixth article of the amendments of the Constitution of the United States, which provide that in all criminal prosecutions the accused shall be confronted with the witnesses against him.

The court said (page 105): "This provision has no application to criminal trials in the State courts for a violation of State laws. This right, secured to the accused is limited in its application to citizens of the United States on trial in the Federal courts, charged with a violation of the Constitution of the United States or of the laws of Congress. * * * Our own State Constitution does not contain any provision securing to the accused the right and privilege of being confronted by the witnesses against him. In the Bill of Rights, adopted by the Legislature, there is a provision similar to the one embraced in the Constitution of the United States, and expressed in the identical words." The learned judge here quotes section 14 of the Bill of Rights, and proceeds as follows: "The accused was confronted by the witness on the former trial, and he had an opportunity of making a cross-examination, and that satisfies the requirements of the statutes. The right secured to the accused, it is to be observed, is 'to be confronted with the witnesses against him.' This language does not require that the accused shall in all cases be confronted with the witnesses against him upon a pending trial of the indictment. The courts have held that the statute is satisfied, in cases of necessity, if the accused has been once confronted by the witness against him in any stage of the proceedings upon the same accusation, and has had an oppor-

tunity of a cross-examination, by himself or by counsel, in his behalf."

In *Brown v. Com.* (73 Pa. 321, 13 Am. Rep. 740), the question was considered whether the testimony taken by the Commonwealth, on a hearing before a justice of the peace, of a person charged with murder, was admissible on the trial. Chief Justice Read, in a very careful and able opinion, considered the question at some length, citing many authorities, and reached the conclusion that the testimony was admissible.

A like question was before the court in *Com. v. Richards*, 18 Pick. 434 (35 Mass. 434) 29 Am. Dec. 608. The learned court said: "It has been contended for the defendant that the admission of such evidence is directly against the twelfth article of the Bill of Rights, which provides that in criminal cases the subject shall have a right 'to meet the witness against him, face to face.' Now, the defendant did meet the witness who has deceased, face to face, and might have cross-examined him before the magistrate touching this accusation. * * * We think it to be very clear that testimony of what a deceased witness did testify on a former trial, between the same parties on the same issue, is competent evidence. The rule is thus well stated in 2 Lil. Abr. 745: 'If one who gave evidence on a former trial be dead, then, upon proof of his death, any person who heard him give evidence and observed it shall be admitted to give the same evidence as the deceased witness gave, provided it were between the same parties.' I cite the passage for the expression 'shall be permitted to give the same evidence' which the deceased gave. It is to be the same, not a part, not the effect or substance, but the whole evidence, which the deceased witness gave, touching the matter or issue in controversy. (1 Phil. Ev. c. 7, § 7; *Miles v. O'Hara*, 4 Binney 111; *Pyke v. Crouch*, 1 Ld. Raym. 730; *Melvin v. Whiting*, 7 Pick. 79; Bull. N. P. 242 *et seq.*") In *People v. Newman* (5 Hill, 295), the Supreme Court of this State held that in a criminal action the public prosecutor will not be allowed to use the testimony given by the witness at a former trial of the same indictment, though he be absent from the State. It is stated in a *per curiam* opinion as follows: "It seems to be settled in this court that nothing short of the witness' death can be received to let in his testimony given on a former trial. (*Powell v. Waters*, 17 Johns. 176; *Wilbur v. Selden*, 6 Cow.

162. And see *Jackson v. Bailey*, 2 Johns. 17; *Beals v. Guernsey*, 8 Johns. 446, 5 Am. Dec. 348; *White v. Kibling*, 11 Johns. 128; *Crary v. Sprague*, 12 Wend. 41, 44, 45, 27 Am. Dec. 110.) But if the rule were otherwise in respect to civil cases, we are of opinion that it should not be applied to criminal proceedings. * * * It is not now necessary, however, to decide that point, the present case being one of mere absence from the territorial jurisdiction of the court."

In the case of *U. S. v. Macomb* (5 McLean 286, Fed. Cas. No. 15,702), the Circuit Court of the United States, Seventh Circuit, held that where at the preliminary examination a witness, since deceased, testified in relation to the offense, the accused being present and his counsel accorded the right of cross-examination, that on a trial before a jury, under an indictment for the same offense, witnesses might be permitted to testify as to what the deceased swore to on the preliminary examination. Judge Drummond in that case made an exhaustive examination of the authorities, and reasons the question on principle at length.

Mr. Underhill, in his work on Criminal Evidence (section 261), says: "In criminal as in civil procedure, the evidence of a witness at a prior trial may be proved as evidence in a subsequent trial of the accused for the same offense if the witness is dead, or has become incompetent by reason of mental derangement. His testimony is admissible either for or against the party in whose favor he originally testified." (*State v. Taylor* (N. C.) Phil. 508, 513; *Hair v. State*, 16 Neb. 601, 605, 21 N. W. 464; *State v. McNeil*, 33 La. Ann. 1332; *O'Brian v. Com.*, 6 Bush, 563, 571; *State v. Johnson*, 12 Nev. 121, 123; *State v. Able*, 65 Mo. 357; *Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 580.

In 1 Greenl. Ev. vol. 1 (16th ed.) § 163g, this language is used: "The death of the witness has always and of course been considered as sufficient to allow the use of his former testimony." Citing a number of cases in England and several States of the Union. (See, also, Abb. Tr. Brief Cr. Cas. § 664, and cases cited; 1 Phil. Ev. [Cow. & H. Notes] p. 571, note 437, and p. 578, note 442.)

It seems to have been the universal rule that the evidence of a deceased witness could be read on the second trial in civil cases. It has been debated to some extent whether the rule

should be extended to criminal trials. It is safe to say that the great weight of authority is in favor of such extension. The object of all trials, civil and criminal, is to arrive at the truth and do justice; and it would certainly tend to an opposite result if testimony carefully taken upon a former trial, at which the accused was represented by counsel, who was permitted the right of cross-examination, is to be excluded by the mere accident of the death of the witness, which is liable to occur in all prolonged litigations.

In this State the discussion of the question seems to have been confined to the lower courts, and mainly in the earlier cases.

There is little doubt that the practice in civil cases in this regard has been adopted by the criminal courts as matter of course, which accounts for the fact that the question has not been presented to this court, so far as we are advised.

The legislature, in enacting section 830 of the Code of Civil Procedure, already quoted, evidently sought to codify what was an existing general rule in both civil and criminal cases. If this legislation could properly be regarded as violating the right of confrontation, as contained in the Bill of Rights, it would amount only to a modification of the rule as laid down in the former legislation. There is, however, no ground for such criticism, as it is very clear that the right of confrontation has been carefully guarded in this and other States, by only admitting such testimony or depositions as were taken in the presence of the accused, represented by counsel, exercising the full right of cross-examination.

While unable to find reversible legal error in this record, we feel constrained to repeat what we said on the first appeal (163 N. Y. 12, 57 N. E. 104)—that “in a case like the one before us, where the indictment charges a heinous and unnatural offense, it is most difficult to secure an absolutely fair trial.”

There are features of this case, common to both trials, where evidence was procured for the People at the fearful cost of a mother voluntarily subjecting a mere child to the alleged repetition of an unthinkable and horrible offense by the father. This is a phase of the case we do not feel justified in passing over without comment. It was an unconscionable and brutal act on the part of the child's mother, in seeking to secure her

husband's conviction, by resorting to a mode of procedure that shocks the moral sense of every right-thinking person.

The case of the People is subjected to the gravest suspicions under the circumstances.

The judgment of conviction should be affirmed.

PARKER, C. J., O'BRIEN, MARTIN, VANN, CULLEN, JJ.,
(and GRAY, J., in result), concur.

Judgment affirmed.

STATE v. WING.

66 Ohio St. 407—64 N. E. Rep. 514.

Decided June 24, 1902.

PROCEDURE: *As to the testimony of an absent or deceased witness taken at a previous trial—Constitutional guaranties to meet witnesses face to face.*

1. In the trial of a criminal case, evidence of the testimony delivered in a previous trial of the same case by a witness not dead, but beyond the jurisdiction of the court or limits of the State, is not admissible unless it appear to the satisfaction of the trial court that the witness is absent through the connivance or by the procurement of the accused.

(Syllabus by the Court.)

Supreme Court of Ohio.

Exceptions from Court of Common Pleas, Hamilton County.

Thomas Wing, convicted of robbery. To an order granting a new trial, the State excepts. Exception overruled.

The defendant in error, Thomas Wing, in April, A. D. 1900, was arrested on a warrant issued by a justice of the peace of Hamilton County on an affidavit filed with him which charged Wing with having committed the crime of robbery in said County on or about the 19th day of April, 1900. The accused was taken before the magistrate for a preliminary hearing, and was represented by counsel.

Among the witnesses called and examined for the State was one Lizzie Waddell. She testified that she had known the accused for some years; that on the night of the robbery, at about 8:45 o'clock, he called at her room, on Ninth street, in

Cincinnati, and displayed to her a roll of money, made up of \$5 and \$10 bills. She asked where he got the money, and he smiled, and told her to watch the newspapers in the morning. He gave her \$25 of the money with which to buy him some wearing apparel, and then left.

The magistrate found the facts sufficient to hold the prisoner to answer the charge in the Court of Common Pleas, and it was so done. At the April term of that Court, Wing was indicted by the grand jury for the same crime, for which he was bound over, and in December of the October term for the year 1900 he was put upon trial to a jury.

Lizzie Waddell, who had testified for the State at the preliminary hearing before the justice of the peace, did not appear at the trial in the Court of Common Pleas. Search was made for her several days before the trial, by an officer with a *subpoena*, at the several places where she had resided in Cincinnati; and, on the day before the trial was to begin, another officer also made search for her, but she could not be found. On these and other facts, perhaps, the Court found the witness was without the jurisdiction of the State of Ohio, and, after diligent search, could not be found.

The Court, having reached this conclusion, over the objection of the accused, permitted the State to offer and introduce the evidence of Thomas H. Darby, who was present and heard the testimony of Lizzie Waddell, the absent witness, at the preliminary examination on the same charge against the accused which is contained in the indictment. Darby stated that he recollected her testimony, and narrated it to the jury as her testimony, to the effect above stated. Exception was duly entered by the prisoner. He was found guilty, and moved for a new trial on the grounds:

"(1) Because the verdict was against the evidence.

"(2) Because the Court erred in permitting Thomas Darby to testify on behalf of the prosecution as to the testimony of one Lizzie Waddell, given at the preliminary hearing of this case before Justice Winkler."

The Court overruled the motion as to the first, but sustained it as to the second ground; thus holding that error was committed in allowing Darby to repeat at the trial the evidence of Lizzie Waddell, given before the magistrate. A new trial was granted, to which the prosecuting attorney, in behalf of

the State, excepted, and made his exception part of the record by a proper bill of exceptions, which, on leave obtained, has been filed in this court under the provisions of sections 7305 and 7306 of the Revised Statutes.

Victor H. Schafer, for the State.

Norwood J. Utler and *Charles E. Tenney*, for the defendant in error.

PRICE, J. (after stating the facts). The right of the State to question in this Court any adverse decision made in the trial of a criminal case by the trial court is found in Rev. Stat. § 7305, which provides:

"The prosecuting attorney may except to any decision of the court, and present his bill of exceptions thereto, which the court shall sign, and the same shall be made a part of the record."

And section 7306 provides:

"The prosecuting attorney may present such bill of exceptions to the Supreme Court, and apply for permission to file it with the clerk thereof, for the decision of the Court upon the points presented therein. * * *"

As decided by this court in *State v. Granville*, 45 Ohio St. 264, 12 N. E. 803, the purpose of such bill of exceptions is not to obtain a reversal, but to determine the law to govern in a similar case. Therefore we have for determination the sole question, did the Court of Common Pleas err in setting aside the verdict of guilty because the evidence of Darby was incompetent? If his evidence was competent on the foundation laid for its admission, the court erred in granting a new trial; but, if such evidence was incompetent, the Court discharged its duty, in correcting the mistake on the first opportunity, by giving the prisoner a new trial.

If this question had arisen in the trial of a civil action, the way might be clear to sanction such evidence, where a proper showing is made for its introduction. Independent of statute, and at common law, there are many authorities which support the doctrine that in civil actions, if it is made to appear to the satisfaction of the trial court that a witness who has once testified in the same case, with opportunity for cross-examination, is beyond the jurisdiction of the court when the

case is retried, his evidence upon the former trial may be given to the jury through the medium of one who heard and remembers it.

Some of the authorities on this point are cited in the brief for the State, and we will not refer to others which are equally clear.

In this State the Legislature has molded a rule in civil cases which is found in section 5242a, of Rev. Stat. This section provides that:

"Whenever a party or a witness, after testifying orally, die, or is beyond the jurisdiction of the court, or cannot be found after diligent search, or is insane, or through any physical or mental infirmity is unable to testify, or has been summoned, but appears to have been kept away by the adverse party, if the evidence given by such party or witness has been or shall be incorporated into a bill of exceptions in the case wherein such evidence was given, as being all the evidence given by such party or witness, and which bill of exceptions shall have been duly signed by the judge or Court, before whom such evidence was given, the evidence so incorporated into such bill of exceptions may be read in evidence by either party on a further trial of the case, and in case no bill of exceptions has been taken or signed as aforesaid, but the evidence of such party or witness has been taken down by any competent official stenographer, the evidence so taken by such stenographer, may be read in evidence by either party on the further trial of the case, and shall be deemed and taken as *prima facie* evidence of what such deceased party or witness testified to orally on the former trial; or, if such evidence has not been taken by such a stenographer, the same may be proven by witnesses who were present at the former trial, having knowledge of such testimony. All testimony thus offered shall be open to all objections which might be taken, if the witness were personally present."

This section is somewhat confused in its terms, and its application is not clear in a case where the evidence of the witness or party at a former trial has not been incorporated into a bill of exceptions in a case where it was given, and signed by the judge or court before whom it was given. In case the evidence has been incorporated into a bill of exceptions, and it has been duly signed by the judge or Court before whom it

was given, the evidence contained in such bill, if it is all contained therein, may be read in another trial of the case, whenever the party or witness, after having testified orally, *die*, or is beyond the jurisdiction of the court, or cannot be found after diligent search, or is insane, or through any physical or mental infirmity is unable to testify, or has been summoned, but appears to have been kept away by the adverse party. On the occurrence of such events the evidence contained in the bill of exceptions may be read in the further trial of the case by either party. But when the right of the official stenographer to testify is reached, later in the section, it is provided that the evidence taken by him "may be read in evidence by either party on the further trial of the case, and shall be deemed and taken as *prima facie* evidence of what deceased party or witness testified to orally on the former trial; or if such evidence has not been taken by such a stenographer, the same may be proven by witnesses who were present at the former trial, having knowledge of such testimony," etc.

It may be doubted whether or not the stenographer can testify in such cases, where the party or witness who had testified on a former trial is not deceased, but living at the time of the further trial. The limitation is very close, and the language may well cause controversy; but we do not need to decide the question, for it is not necessary to do so in order to determine this case. If the right of the stenographer is confined to a case where the party or witness at former trial is deceased, like limitation may be claimed for one who was present at the former trial, having knowledge of the testimony of the party or witness.

The foregoing analysis of the section quoted is made because counsel for the State cite it as authority for the admission of the Darby evidence, although the section is a part of the Code of Civil Procedure, but, if we are to admit the claim, we would then be troubled to know whether the right to narrate what was said by a party or witness on a former trial is not confined to the condition that such party or witness had died since the former trial.

However this may be, we are of opinion that, unless there is other legislation which extends the provisions of this section to the trial of criminal cases, it will not apply. The common-law rules regulating the competency of witnesses and their testi-

mony have, as a general rule, applied to both civil and criminal cases. Where, for the trial of civil cases, a different rule was desired, the Code of Civil Procedure has provided for the change. And if the furtherance of justice required a change of the common-law rule as to the trial of criminal cases, the legislature has made the changes, as to the competency of parties or witnesses, and has otherwise provided for the mode and manner of trial and procedure.

But the State claims that the foregoing section (5242a) has been extended to criminal procedure by the terms of section 7289, Rev. St., which reads:

"Except as otherwise provided, the provisions of the Code of Civil Procedure relative to compelling the attendance and testimony of witnesses, their examination, and the administering of oaths and affirmations, and proceedings for contempt to enforce the remedies and protect the rights of parties, shall extend to criminal cases, so far as they are in their nature applicable."

This section does not mention the *competency* of witnesses or their testimony, and does not extend the rules of civil procedure as to their competency to criminal cases, and hence does not serve the purpose claimed for it by the State.

We are, therefore, after all that is said about statutory rules and provisions, remitted to the common law for our guide in this case. If these statutory provisions can be extended to criminal cases, we are confronted with a question of their validity under our fundamental law. Whether we turn to the Codes of Civil or Criminal Procedure, or both, or to the rules of evidence at common law, we must look to the Constitution of our State, to see if the rights guarantied by it to a citizen charged with a crime are not infringed by permitting one who was present and heard the evidence of a material witness for the prosecution at one trial to narrate his evidence on a second or further trial on the same charge, even if such witness is beyond the jurisdiction of the court, and cannot be found, at the time of the further or second trial.

Section 10 of our Bill of Rights provides:

"* * * In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him,

and to have a copy thereof; to meet the witnesses face to face.
* * *"

A similar provision, in different language, is found in the Federal Constitution.

It has been frequently held, and by many different Courts of high authority, that, when these Constitutions were adopted (both state and federal), they were adopted with a recognition of established contemporaneous common-law principles; and, as said in one of the cases, they did not repudiate, but cherished, the established common law. This law being in the spirit of the adoption of the constitutional guaranty, whatever exceptions to the rule for the production of the witness for the prosecution at the trial then existed remained as exceptions thereafter. Hence it is necessary to learn, if we can, the extent of the exceptions then recognized by the common law, especially as settled in the United States. This field of investigation is a large one, and we can here give but a summary, and cite a few of the leading cases.

We have not before had this precise question before this court. There are two well-known exceptions found in our State to the rule excluding hearsay evidence in criminal cases, but they are not decisive of this case.

One is where a witness for the State died after having testified, and at a subsequent trial on the same charge it was permitted one who heard the testimony of the deceased witness, and remembered it, to repeat the same on the second trial. This was held to be proper in *Summons v. State*, 5 Ohio St. 325. The court in that case held that "the clause of the tenth section of the Bill of Rights, providing that *on any trial in any court the party accused shall be allowed to meet the witnesses face to face*, which, like numerous other provisions in the Bill of Rights, is a constitutional guaranty of a fundamental principle well established and recognized at common law, has reference to the *personal presence* of the witnesses called to testify, and not the *quality or competency* of the evidence to be given." Speaking of this constitutional guaranty, on page 341, Bartley, J., says:

"The scope and operation of it are clearly defined and well understood, in the common-law recognition of it, and the assertion of it in the fundamental law of the State was designed neither to enlarge nor curtail it in its operation, but to give it

permanency and secure it against the power of change or innovation."

The State cites that case as sustaining its contention, and some language used by the learned judge seems susceptible of that view; but taking the whole case, and confining it to the point necessary to be decided, it is found not to do so.

And another well-known exception to the rule are dying declarations. *Summons v. State, supra*, and *Robbins v. State*, 8 Ohio St. 131.

The ground upon which such declarations are admitted in cases of homicide—declarations made in *articulo mortis* by the subject of the homicide—is largely that of necessity, in many cases, and became a rule mainly for that reason.

In some of the early cases in England another exception, recognize^d in civil cases, at least, was where the witness at the former trial was "*beyond the seas*" at the time of the second trial. What the same courts would now decide in such case, since rapid passage has robbed the ocean of most of its terrors, we do not know. Then the tedious and dangerous journey incident to existing means of navigation might lead a Court of justice in civil, and perhaps in criminal, cases, to admit the class of testimony under consideration.

But our research has failed to find a line of well-considered cases in this country where the fact that a witness, after having testified for the State in a criminal prosecution, has gone beyond its jurisdiction, will justify the introduction of his testimony at that trial on a second trial, unless it appear that the absence of such witness is through the connivance or procurement of the accused.

We cannot discuss all the cases, or even quote from them, but we think the weight of authority is against such right in the State. There is no constitutional provision requiring the production of witnesses in court in civil cases. There surely is such guaranty in criminal procedure.

In *People v. Sligh*, 48 Mich. 54, 11 N. W. 782, the Supreme Court of that State held that: "Witnesses in civil cases are not required by any constitutional rule to be produced in open court. * * * The testimony of a witness in the trial of a criminal case may be reproduced, if necessary, upon a later trial, if the witness has meanwhile died." * * * On page

56 (48 Mich., and page 783, 11 N. W.), Campbell, J., says: "The exception, if justified at all, can only be maintained on the ground of necessity, and to prevent a failure of justice. The cases which sustain it on the ground that the rules of civil and criminal evidence are identical are not, in our opinion, correct."

In *State v. Houser*, 26 Mo. 431, the Supreme Court of that State held: "A deposition of a witness, taken upon the preliminary examination before a committing magistrate in the presence of the accused, is not admissible in evidence on the trial upon proof that the witness is beyond the jurisdiction of the court.

"If, however, the absence of the witness at the trial is procured by the defendant, the deposition would be admissible in evidence." A full discussion of this question is contained in that case.

In *Owens v. State*, 63 Miss. 450, it is held: "In a criminal trial, evidence of the testimony delivered in a previous trial of the same case by a witness not dead, but beyond the jurisdiction of the court or the limits of the State, is not admissible." To the same effect is the case of *Pittman v. State*, 92 Ga. 480, 17 S. E. 856.

There it is held: "The better opinion seems to be that, though the death of a witness who testified at the commitment trial will render what he testified admissible in evidence in behalf of the State on the final trial of the accused for the same offense, yet the removal of the witness from the State, and consequent inability to procure his attendance—the accused doing nothing to prevent his attendance—will not, the witness being still alive, render such testimony admissible."

A similar holding is in *Brogy v. Com.*, 10 Grat. 722, decided by the Supreme Court of Appeals of Virginia. See, also, *McLain v. Com.*, 99 Pa. St. 86.

In *Com. v. McKenna*, 158 Mass. 207, 33 N. E. 389, the Supreme Judicial Court of that State held: "At the trial in the Superior Court, on appeal, of a criminal case, a witness cannot testify to what he heard another person, who is ill and unable to attend the trial, testify to at the trial of the case in the lower court." That Court cites many cases to support its conclusions.

In *U. S. v. Angell*, 11 Fed. 34, the Circuit Court held:

"Where a witness who testified at the preliminary examination of the defendant upon the same charge is living, but has gone out and beyond the jurisdiction of the court, evidence of what he said on the former trial is inadmissible in a criminal prosecution."

The foregoing and many of similar import not cited herein come from States having constitutional guaranties on the subject like our own, and we are content in referring to another case decided recently by the Supreme Court of the United States: *Motes v. U. S.*, 178 U. S. 458, 20 Sup. Ct. 993, 44 L. Ed. 1150.

In that case Motes and others were indicted in the Circuit Court for the Northern District of Alabama for the crime of murder, committed in the execution of a conspiracy to injure, oppress, threaten, and intimidate one Thompson because of his having informed the United States authorities of violations by the conspirators of the laws of the United States relating to distilling.

At the preliminary trial before a United States Commissioner, Taylor, one of the accused, testified, and his evidence was put in writing and signed by him. It was sufficient, if accepted, to establish the guilt of all of the defendants. The accused had opportunity to cross-examine him. At the final trial in the Circuit Court, Taylor, who had pleaded guilty, was called as a witness for the Government, but did not respond. He had disappeared, although seen in the corridor of the court building an hour before being called. His absence was not by the procurement or advice of the accused, but was due to the negligence of the Government officials. The Circuit Court, over the objections of the accused, allowed Taylor's written statements made under oath at the examining trial to be read in evidence to the jury. The accused was found guilty, and sentenced for life. Held, "that the admission as evidence of the written statements made by Taylor at the examining trial was a violation of the rights of the accused under the clause of the Sixth Amendment to the Constitution of the United States, declaring that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witness against him."

In our judgment, these cases contain the better and safer doctrine, as holding sacred the high guaranty for the protection of life and liberty, which should not, except for the best of

reasons, be weakened, invaded, or destroyed. It is not invoking the old maxim, sometimes abused, "that it is better that ninety-nine guilty persons should escape, rather than one innocent man should suffer," but the maintaining of a plain and valuable right vested in every one accused of crime.

There is another reflection which we ought not to pass by. In the case at bar the State made the showing at the trial that the desired witness could not be found by the officers, and was then beyond the jurisdiction of the court. By adjournment or continuance of the case to a future time, she might have been found and produced in Court. The State should not be given undue advantage of a prisoner, and it may be that, in the hurried examinations which sometimes are practiced before magistrates in a large city, a cross-examination is greatly restricted, while, if the witness appears in the Court of Common Pleas, the latitude of a full cross-examination might properly increase the legitimate opportunities for a fair trial and an acquittal. There the processes of sifting the evidence and ascertaining the truth are far superior to those available before a justice of the peace or other examining magistrate. Hence great caution should be exercised in allowing one to repeat at the final trial what a material witness may have said on the former hearing, and it should not be done except in clear and well-recognized cases of necessity.

Entertaining these views, we conclude that the admission of the Darby evidence by the Court of Common Pleas was error, and that it was not error to set aside the verdict which followed its admission; and the exception of the State is overruled.

Exception overruled.

BURKET, SPEAR, DAVIS, and SHAUCK, JJ., concur.

DUKES V. STATE.

80 Miss. 353—31 So. Rep. 744.

Decided April 7, 1902.

PROCEDURE: *Testimony of a deceased witness given at the preliminary examination, not admissible.*

1. In each trial of a criminal case the accused is entitled to be confronted by the witnesses, against him; except, that when in a previous trial of the same case and issue, a witness testified in

open court against him, and, subsequently died, the testimony of such deceased witness may thereafter be given against the accused at any trial of the same case and issue, after the death of such witness.

2. Applying the above doctrine, to a murder case, it was error to admit in evidence, the testimony of the deceased given against the accused in a hearing of a charge of robbery, before an examining magistrate; even though, it was claimed that the death was the direct result of violence committed in the alleged robbery.

Supreme Court of Mississippi.

Appeal from Circuit Court, Copiah County; Hon. Robt. Powell, Judge.

Antonio Dukes, convicted of murder, appeals. Reversed.

Millsaps & Lockwood, for the appellant.

Monroe McClurg, Attorney General, for the State.

WHITFIELD, C. J. The record shows the following agreement: "It is admitted that in the justice's court the defendant was on trial for robbery, and the robbery occurred at the same time that the blow was inflicted from which the party afterwards died, and that the blow was part of the means used in robbing him." The appellant was charged with having committed robbery upon James Welch, a peddler, before the justice of the peace on the committing trial. On that trial Mr. Welch was present, confronting the accused, and testified under oath. The appellant had opportunity to cross-examine Mr. Welch; being present himself, and being represented by counsel. In the interval between the committing trial and the convening of the Circuit Court, James Welch, the injured person, died. The testimony does not seem to have been written in compliance with the statute, in accordance with which the testimony of Mr. Welch should have been taken down in writing, and returned to the Circuit Court. The appellant was indicted in the Circuit Court for murder, not robbery. On his trial for murder, four witnesses were introduced by the State to prove orally their recollection of the substance of the testimony delivered by Mr. Welch on the committing trial. This testimony was objected to as incompetent. The court overruled the objection, and the question presented by this appeal is whether that action of the court was correct on that state of case. The general rule is stated by Mr. Bishop in 1 New Cr. Proc.

§ 1195: "Of necessity, if a witness has died, or has become insane, though but temporarily, or by the opposite party is kept out of the way, or is too ill or infirm to come to the court (for it cannot adjourn to his house), or if from any cause for which the party is not responsible, such as residence beyond the process of the court, or the like, the witness' personal presence cannot be had (a rule as to which the decisions are somewhat indistinct and inharmonious), added to which, if there has been a prior proceeding, involving the same issue between the same parties, conducted regularly in pursuance of law, and therein the defendant had the opportunity to cross-examine the witness against him—not otherwise—what was on such former hearing testified to by a witness whose presence cannot now be had may be shown against the defendant." Mr. Wharton says that it is enough if the offense be "substantially the same," his statement of the rule being as follows (Whart. Cr. Ev. 9th ed. § 227): "What a deceased witness testified to on a former procedure against the same defendant for the same offense as that under trial, or for an offense substantially the same, may be proved by witnesses who heard the testimony of the witness; nor is such oral evidence excluded by the fact that the original testimony was reduced to writing, nor, in criminal cases, by the constitutional provision that the defendant is entitled to be confronted with the witnesses against him." It ought to be noted, in passing, that Mr. Wharton improperly calls this a species of hearsay evidence. A dying declaration is hearsay evidence, but the testimony of the original witness to the facts, delivered under oath, is not hearsay evidence, as pointed out by some authorities. The courts hold contradictory views on some of these propositions. For instance, it is held in *Finn v. Com.* 5 Rand. 701, that such testimony is not admissible in any criminal case whatever; and in Massachusetts, New York, New Hampshire, and Mississippi it is held that it is only admissible where the witness is dead. *Le Baron v. Crombie*, 14 Mass. 234; *Powell v. Waters*, 17 Johns, 176; *Crary v. Sprague*, 12 Wend. 41 (27 Am. Dec. 110); *Wilbur v. Selden*, 6 Cow. 162; *State v. Staples*, 47 N. H. 119 (90 Am. Dec. 565); *Owens v. State*, 63 Miss. 452. Again, it is held in New York and Massachusetts that the witness must state the precise words, and not the substance only, of the testimony of the deceased witness. We concur in the very able opinion of Judge Drummond in *U. S.*

v. Macomb, 5 McLean, 286, Fed. Cas. No. 15,702, on this point. See, specially, page 299. Judge Drummond's reasoning on this proposition is unanswerable. It is enough if the witness is able to state the material substance of the testimony of the deceased witness. Again, in an opinion of remarkable power delivered by Davidson, J., in *Cline v. State*, (Tex. Cr. App.) 36 S. W. 1099 (37 S. W. 722, 61 Am. St. Rep. 850), it is held the constitutional provision requiring the witness to confront the accused on the trial means the trial on the merits before the jury; that consequently testimony of the deceased taken before an examining court is not testimony taken on a former trial, within the meaning of the word "trial" in this clause of the Constitution; and that the defendant has the right to be confronted by the witness on such trial on the merits before a jury as many times as there are such trials—hung juries, reversals, etc., not changing the rule. We call attention to these differences between the courts to emphasize the caution and extreme solicitude manifested by the courts in allowing this testimony to be introduced. And it will be noticed that this State admits the testimony in but one case, to-wit, the death of the witness. Mr. Bishop says, in 1 New Cr. Proc. p. 732, note 7, "Such is, by all opinions, the doctrine in civil cases," but there may be a State or two wherein it is not received in criminal cases; citing *Owens v. State*, 63 Miss 450; *Finn v. Com.*, 5 Rand. 701. It doubtless would be well for our Legislature to enact that such testimony should be received in all the categories mentioned in section 1195 of Dr. Bishop's work; adding the case of a witness made incompetent to testify since he delivered his testimony on the former trial. This court has held strictly to the rule of admitting such evidence, only where the witness has died. This shows the necessity for extreme caution in application of the rule in this State.

Coming now to the test, on reason and principle, as to the admissibility of this sort of evidence, that test seems to be chiefly that the defendant on the former trial had full opportunity for cross-examining the witness; the issue (that is to say, the offense charged) being substantially the same. This involves two propositions: First, that the offense charged, or, as Mr. Russell puts it, "the point in issue," or, as most authorities put it, "the issue," must be the same; and, second, the issue being the same, the defendant must have full opportunity for

cross-examination. The strongest authority for the State in this case is *Reg. v. Beeston*, Dears. Cr. Cas. p. 405. But we may say, in short, that that and various other cases establish this proposition: That where the defendant was examined before the committing magistrate on a charge of assault and battery with intent to kill and murder, and the injured party testified against him, under oath, and was fully cross-examined, his testimony is competent against the accused on a trial for murder in the Circuit Court; the injured party having in the meantime died. Obviously the issue in such case is substantially the same. In the *Case of Beeston, supra*, at page 409, the eminent counsel for the prisoner (Mr. Huddleston) was asked, "Can you suggest any question material on the one charge, and not on the other?" And he was not able to do so. But it must be obvious that there are very many questions which might be appropriately asked on the charge of robbery which would not necessarily or perhaps ordinarily be asked on the charge of murder. We have given the question the most careful consideration, and in view of the doctrine of this court in the *Owens Case, supra*, and the manifest caution and jealous care to preserve the constitutional guaranty characterizing the decisions of the courts elsewhere, we are constrained to hold that there is substantial merit in the contention that the issue on the charge of robbery is not substantially the same, within the meaning of this rule of evidence, with the issue on the charge of murder in the Circuit Court, although the blow inflicted in effecting the robbery was the same which caused the subsequent death. It must be perfectly clear that the issue—the offense charged—is substantially the same, so that the questions asked to make out the one offense would be the same as those asked to make out the other, else the rule is not satisfied, and the testimony is incompetent. We refer especially to note in 61 Am. St. Rep. 891, where the rule is thus stated: "From among the multitude of cases sustaining this rule that the testimony of a witness for the State, given on a preliminary examination or former trial of the accused, who was present and had reasonable opportunity to cross-examine the witness, is competent against the defendant on his subsequent trial for the same charge—the witness having died since giving his testimony, and before the subsequent trial—may be cited the following authorities, in addition to those already noticed." And a

multitude of the most recent authorities are then quoted in support of the rule as stated. And also to the note *Bergen v. People*, 65 Am. Dec. 676, and *Brown v. Commonwealth*, 73 Pa. St. 321, 13 Am. Rep. 740. See especially, also, 2 Am. & Eng. Ency. of Law (2 ed.) pp. 536-537, with notes. It will be noticed in *Beason's Case*, *supra*, that the observation of Jervis, C. J., at page 413, to the effect that the charge before the magistrate may not be the same technical charge on which he is afterwards tried, was made in construction of the Act of 11 & 12 Victoria, which is set out at page 406, and not as stating the rule in the absence of statute. It will be further noticed that in *Owens v. State*, 63 Miss. 452, the language is that the testimony must be "given under oath in a judicial proceeding between the same parties on the same issue." We hold that it is enough if the issue be substantially the same.

It follows that the judgment must be reversed, and a new trial awarded.

RISIEN v. STATE.

44 Texas Crim. Rep. 413—71 S. W. Rep. 974.

Decided January 28, 1903.

RAFFLE—LOTTERY: *Distinction between a raffle and a lottery—Insufficiency of the indictment—Evidence shows that of a raffle, and not that of a lottery.*

1. A lottery is "game in which there is a keeper or exhibitor. This keeper or exhibitor has the real fund, and against this the bettor stakes his money, which may be evidenced by tickets. On the side of those who hold the ticket it is perfect game of chance. On the side of the keeper there are both chance and skill."
2. A raffle is "a game of perfect chance, in which every participant is equal with every other, in proportion to his risk and prospective gain. The prize is a common fund, or that which is purchased by a common fund. Each is an equal actor in developing the chances in proportion of his risk and prospective gain; whether they be developed with dice or some other instrument is not material. The successful party takes the whole prize, and all the rest lose."
3. The indictment, purporting to charge lottery, held insufficient, in that, it avers that a *single* prize was to be distributed among the purchasers of the tickets instead of going to the winner.

4. The indictment should have been framed, so as to fit the testimony to be offered in the case.
5. The evidence fails to show a lottery; but does that of a raffle, which is not a criminal offense in Texas.

Court of Criminal Appeals of Texas.

Appeal from Limestone County Court; Hon. A. J. Harper, Judge.

Sam Risien, convicted of establishing a lottery, appeals. Reversed.

A. B. Rennolds, J. B. Kimbell, and Gibson & Bryant, for the appellant.

Robert A. John, Assistant Attorney General, for the State.

HENDERSON, J. Appellant was convicted of establishing a lottery, and fined \$100; hence this appeal.

Appellant made a motion to quash the indictment, which was overruled, and he assigns this as error. The charging part of the indictment is as follows: That Sam Risien "did then and there unlawfully establish a lottery for the purpose of exposing a horse and buggy to be by lot and chance of certain drawings to be disposed of and distributed to and among the persons who should become the purchasers of tickets therein; a more particular description of which said lottery and the mode of carrying it on is to the grand jury unknown," etc. The form laid down in Willson's Criminal Forms (form No. 233) alleges both the establishment of a lottery and the disposition of property by means of a lottery; and *State v. Randle*, 41 Tex. 292, is referred to. However, in the note Judge Williams says "that the usual precedents for this offense are more particular and certain in its description than approved in said case." Here the pleader merely proposes to set out the establishment of a lottery, and does not allege a sale by means thereof. Of course, it is competent to properly set out merely the establishment of a lottery, without any allegation of a disposition of property by means of a lottery. The particular criticism made of this indictment is that it alleges the disposition of a single prize to be distributed; not to the winner, but among the persons who should become the purchasers of tickets therein. Accurately speaking, a single prize could not be distributed or parceled out among the various purchasers of tickets, but would go to the

lucky person or the winner. So it occurs to us that the allegations of the indictment should have been drawn to respond to the proof offered in the case.

Appellant also insists that the proof introduced did not show or establish the keeping of a lottery, but, on the contrary, the state proved a raffle for personal property under the value of \$500, and consequently no offense was proven against appellant. If we turn to the books, outside of our own Reports, defining a lottery, it will be difficult, if not impossible, to determine that a raffle is not a lottery. Bishop Stat. Crimes, §952, and authorities there cited: Webster and Worcester Dictionaries, defining a lottery. Mr. Webster says, "A lottery is a disposition of prizes by lot or chance," and this definition seems to be adopted in our State. *State v. Randle*, 41 Tex. 292. If these authorities are to be followed in defining the offense under our statute, the facts shown in the record here would prove the disposition of the horse and buggy by chance or lot. The difficulty arises because our statute authorizes the raffling of personal property (which is nothing but the disposition of the same by lot or chance) where the value of such property is under \$500; and our authorities on the subject have endeavored to distinguish between a lottery, which is inhibited by statute, and a raffle, which is authorized. In *Stearnes v. State*, 21 Tex. 692, Judge Roberts defines a lottery, which he terms a "grand raffle," as a game in which there is a keeper or exhibitor. This keeper or exhibitor has the real fund, and against this the bettor stakes his money, which may be evidenced by tickets. On the side of those who hold tickets it is a perfect game of chance. On the side of the keeper there are both chance and skill. On the other hand, he defines a raffle, which is authorized by our Code, as a game of perfect choice, in which every participant is equal with every other in the proportion of his risk and prospective gain. The prize is a common fund, or that which is purchased by a common fund. Each is an equal actor in developing the chances in proportion to his risk; whether they be developed with dice or some other instrument is not material. The successful party takes the whole prize, and all the rest lose. That element of one against the many, the keeper against the bettor, either directly or indirectly, is not to be found in it. It has no keeper, dealer, or exhibitor. This case has been followed in *Barry v. State* (Tex. Cr. App.) 45 S. W. 571; *Prendergast v.*

State, 57 S. W. 850, 41 Tex. Cr. R. 358. Referring to the evidence showing the method by which the horse and buggy were disposed of, it would appear that it fits the definition given by our decisions of a raffle; that is, the promoter of the raffle seems to have issued tickets to the value of \$200, thus placing the horse and buggy which were to be disposed of at that value. The tickets were numbered from 1 to 200. These were drawn, and the persons drawing them gave for each ticket the amount represented by its number; that is, if a person drew No. 5, he paid 5 cents for his ticket; and, if a person drew No. 185, he paid \$1.85 for his ticket. This common fund went to the purchaser of the horse and buggy; and then each holder of the respective tickets, at a time designated, threw dice, the one throwing the highest dice being entitled to the whole prize. Now, if there is any difference between the definition given and the statement of facts here presented, it is that all did not contribute equally in the purchase money of the prize, though all had an equal opportunity or chance to win it. But we cannot conceive that this makes any difference. The party was not indicted here for disposing of the tickets, but for disposing of the horse and buggy by means of the raffle. If it had been a lottery, unless all the tickets had been sold, and there had been but one prize, the keeper or exhibitor of the lottery may not have disposed of all the tickets representing the prize, and so he would have retained both the money and the prize. But here, in the raffle, all the tickets were disposed of, and some one was bound to win the prize. This, it occurs to us, is another distinction between a raffle and a lottery. In view of the facts, as shown by the record in this case, if the decisions of the State are followed, and if there is such a thing as a raffle authorized by law, we are constrained to hold that the mode adopted here of disposing of the horse and buggy was a raffle and not a lottery.

There are other errors assigned, but we do not deem it necessary to discuss them.

The judgment is reversed, and the prosecution ordered dismissed.

Reversed and dismissed.

STATE v. DALTON.

109 Tenn. 544—72 S. W. Rep. 456.

Decided February 27, 1903.

REMISSION OF SENTENCE: *The power of the judge to change the sentence ends with the term of court—The Governor alone, has power to pardon, or remit sentence after expiration of the term of court.*

1. The power to grant a reprieve is, by the Constitution, vested exclusively in the Governor. Any effort of the Legislature to extend or confer that power on any other office or tribunal is void.
2. During a term of court, the presiding judge has power to amend, modify or vacate any judgment or order entered at that term; but with the adjournment of the term his power to do so ceases.
3. At a term of court subsequent to that at which an accused was sentenced, a special judge entered an order, which recited: that with the consent of the prosecutor, and on account of sickness in the family of the accused, the remainder of the term of imprisonment should be suspended during good behavior. *Held:* that the order was void.

Supreme Court of Tennessee.

Appeal from the Circuit Court of Wilson County; Hon. R. P. McClain, Special Judge.

West Dalton was convicted of larceny. At a subsequent term, the unserved portion of the sentence was remitted during good behavior. The State appealed. Reversed.

Charles T. Cates, Attorney General, for the State.
No counsel marked for Dalton.

MR. JUSTICE SHIELDS delivered the opinion of the court.

This case involves the power of a judge of the Circuit Court to remit the punishment imposed upon a convict upon trial and conviction at a former term of the court to that at which it was rendered. The defendant, West Dalton, was indicted and arraigned at the May term, 1902, of the Circuit Court of Wilson County, upon a charge of petit larceny, and, entering a plea of guilty, his punishment was fixed by the jury impaneled for that purpose at confinement and hard labor in the workhouse of the county for eleven months, and a judgment to this effect, and of infamy, and for the costs was

rendered against him, from which there was no proceeding in error.

At the succeeding September term of the court, a special judge presiding, an order, reciting that the prosecutor consented thereto on account of sickness in the family of the defendant, was entered "remitting the remainder of the imprisonment during the good behavior of the defendant," and releasing the costs, and the case is now before us upon a proceeding impeaching the validity of this action of the court.

This order remitting the unexpired portion of the imprisonment and releasing the costs adjudged against the defendant is absolutely null and void.

The judgment entered against the defendant at the May term of the court was final, and nothing more remained to be done. The court did not and could not reserve the right to set aside or alter it, and upon the adjournment of that term *sine die* the parties were discharged from its further jurisdiction, and it was divested of all control over them and the case. It could do nothing at a subsequent term affecting the judgment rendered.

The action of the court in this case was, in substance, an attempt to exercise the pardoning power, which, by the Constitution (article 3, § 6), is vested solely in the Governor of the State. The vestiture of the power to grant reprieves and pardons in the chief executive is exclusive of all other departments of the State, and the Legislature cannot, directly or indirectly, take it from his control, and vest it in others, or authorize or require it to be exercised by any other officer or authority. It is a power and a duty intrusted to his judgment and discretion, which cannot be interfered with, and of which he cannot be relieved. The circuit judge's action in remitting the imprisonment and releasing the costs adjudged against the defendant cannot be sustained under section 7226 of Shannon's edition of the Code, or Act 1891, c. 123, 18 (Shannon's Code, §7423), authorizing the discharge of convicts confined in workhouses under certain circumstances. The authority given judges by the first statute is confined, upon a proper construction of this act, to the term of the court at which the judgment was rendered, and the power to discharge inmates of the workhouse is confined by the latter statute to the workhouse commissioners. If, however, these statutes could be construed to

cover the case at bar, we would hold them to be in contravention of Article 3, § 6, of the Constitution, and inoperative and void, as an attempt to vest in judges and workhouse commissioners the pardoning power, which, as said, cannot be constitutionally vested in any form or to any extent in any other officer but the Governor. Any and all attempts of the Legislature to vest this power in any officer, board, or commissioners to any extent, or in any form, advisory or otherwise, or to regulate its exercise, are in violation of the provision of the Constitution referred to, and absolute nullities.

Nor can the action of the court be sustained upon any supposed control of the court over its records. So long as the court remains in session, the record is in the breast of the judge, and all judgments entered at that term may be vacated or modified upon any subsequent day of the term, but upon final adjournment the power of the court over the record is gone.

This is the rule governing final judgments of all courts of record, save certain proceedings authorized by statute to correct errors resulting from clerical mistakes, which it is not claimed apply to this case. After the parties to the cause have been dismissed by final judgment and adjournment of that term, the court has no more jurisdiction of them and of the case upon the merits than where no suit has been instituted or process served. Any order or judgment made at a subsequent term affecting a final judgment unquestioned by proceedings in error, except in the cases mentioned, is *coram non judice*, and a nullity. *Van Bibber v. Sawyers*, 10 Humph. 81, 51 Am. Dec. 694; *Bank v. Fowlkes*, 4 Sneed, 462; *Johnson v. Tomlinson*, 13 Lea, 604.

A judgment at a subsequent term, vacating one entered at a former term of the court by consent of parties given in open court, is void. *Anderson v. Thompson*, 7 Lea, 560. These are all civil cases, it is true, but the principle applies with equal force to criminal cases. The State has the same right to insist upon the execution of judgments rendered in criminal cases prosecuted by its officers as other litigants have in those recovered by them, and public policy forbids the unauthorized interference of any one to prevent the execution of judgments secured by the State for the punishment of crime. All proceedings reviewing or modifying final judgments of

courts in criminal cases other than by proceedings in error or by the chief executive, tend to render punishment for crime less certain, and embarrass the administration of the criminal law.

The order remitting the unexpired punishment of the defendant and releasing him from costs adjudged against him is reversed, and the case remanded, that the former judgment of the court may be executed.

NOTES (By J. F. G.)—How applicable the following immortal lines from the poet Thomas Hood:

Alas for the rarity
Of Christian charity
Under the Sun.

Poor Dalton had no counsel to represent him in the Supreme Court, and the fact was overlooked that the power of judges to grant reprieves comes to us from the common law, and that in England they could be granted after the court had adjourned for the term. However there may be a difference between a remission of sentence and a *judicial reprieve*. A judge may reprieve; but not pardon. The subject of *judicial reprieves* will be treated of in the notes to the next case. The above opinion should be read in connection with an earlier Tennessee case—*Allen v. State*, Martin & Yerger, 295, decided in 1827, in which the following opinion was rendered:

WHYTE, J., delivered the opinion of the court. Daniel Allen was tried at the Circuit Court of Green County, September Term, 1826, for the murder of James Houston. He was found not guilty of murder, but guilty of manslaughter; and judgment was rendered that he be branded, imprisoned six months, and pay the costs of the prosecution. In the transcript of the record sent up to this court, after the entry of the judgment, is the following entry or memorandum: "In this case the defendant, by his counsel, moved the court to postpone the execution of the sentence until the next term of this court and to take bail for his appearance at said court, to the end that he might apply to the Governor for a pardon; which motion the court overruled, and ordered the sentence to be put into execution. From which order overruling said motion, the defendant prayed an appeal to the Court of Errors and Appeals," etc. The transcript then shows, that Daniel Allen entered into a recognizance, with security, to appear here at this term of the court, and that the appeal be granted.

This cause coming on, on a former day of the term of this court, to be heard on this appeal in the nature of a writ of error, the judgment of the Circuit Court was affirmed. It was then moved, by his counsel, that the plaintiff in error, Daniel Allen, have the execution of said judgment respited, for the purpose of permitting him to apply to the Governor for a pardon, and that in the meantime he be admitted to bail.

This application is now made to this court, upon the following grounds, by his counsel:

1st. That the motion made in the court below, for time to apply for the pardon, set forth in the memorandum in the transcript, ought to have been sustained by the judges, for two reasons. 1st. Upon the intrinsic circumstances of the case appearing upon the trial of the cause; and 2nd. Upon the constitutional privileges of every citizen, guaranteed to him by the sixth section of the second article of the Constitution; which says, "He (the Governor) shall have the power to grant reprieves and pardons after conviction, except in cases of impeachment.

2nd. Upon a statement now presented of the evidence purported to have been given at the trial in the court below, verified in this court, by the affidavit of two persons, as being substantially the testimony which was given in the trial below; which statement is further verified by three very respectable members of the bar, who were counsel for Allen on the trial, to be a true and correct statement of the testimony given in the cause; and that the said Daniel Allen is a high minded, honorable, industrious man, and that he is a fit subject for executive clemency.

Upon the first of these grounds, that this court should now sustain the application for time, etc., because the judge of the Circuit Court ought to have sustained the motion below, this court has to observe that it is a revising court, and acts upon the record properly presented to it; the memorandum and the matter thereof is no part of the record brought up to this court; it belongs not to the cause, it forms no part of the process, pleadings, or judgment. To have constituted a part of the record it ought to have been excepted to, by a bill of exceptions, sealed by the judge, and made a part of record. Questions of this kind have often come before this court; as for instance, upon affidavits presented to the court below, and filed among the papers of the cause; but no exception to the judgment, or order of the court upon the matter of them, appearing by the bill of exceptions, they could not be noticed or acted upon by this court. An instance of which occurred in this term, in the case of Gardenshire, where an affidavit for a change of venue, was filed among the papers, but not incorporated by a bill of exceptions with the record. This court held they could not notice it.

Suppose the matter of the memorandum in the transcript, had, by bill of exceptions, formed a part of the record, the question would have been raised, whether the court would or could have examined the matter, for the purpose expressed, viz.: giving time to apply for a pardon, as being the exercise of the discretion of the Circuit Court, as founded upon and directed by the circumstances appearing upon the trial, and the matter appearing in and by the same?

This court has examined into the exercise of the discretion of the judge below, in this case, to-wit, where a new trial has been refused by him, upon the weight of testimony. This court has said, contrary to the practice of the Supreme Court of the United States,

in a like case, that it will examine into, and control the discretion of the court below, in this, that if the weight of testimony greatly preponderates in favor of the application, against the verdict given, it will grant a new trial. This court has been, in part, influenced to adopt this practice from the analogy to the English practice, of the judge at *nisi prius* saving the like question for the consideration and opinion of the whole court in Westminster Hall.

But it must be noticed that the discretion exercised by the judge below, and desired by the present application to be controlled by the court here, is to a different point, regarding a different object, than the right or wrong conclusion of the jury upon the case submitted to them. But viewing the case altogether aside from the correctness of the verdict and further interference of a court in that respect, and as directed to the view, examination, and exercise of the constitutional provision of the Governor, as a fit object or otherwise for pardon, is, perhaps, what the judge below had nothing to do with; and of course this court, for the same reason, is in the same situation. But upon this no opinion is given, as it is not called for by the case before them.

The next question, can this court interfere upon the second ground, that statement of facts above noticed, prepared at this term since the affirmance of the judgment of the Circuit Court, and verified by affidavit in this court? This affidavit is intended to supply the defect, or rather absence, of the matter in the record already noticed, to-wit, of the facts of the case, as they appeared upon the trial; and it is upon this contended by the counsel that the court have the discretion to grant or refuse. If this court have a discretion, they think it ought not to be called into action by an after statement, *ex parte*, when the Attorney General had no opportunity of examining into or contesting its correctness. This court will here observe that these remarks are not called for from any, the most distant, allusion to the probable incorrectness of the statement now presented; they have an undoubted belief of and confidence in its correctness; but, for the sake of principle, and the avoidance of those evils in the administration of justice which such an example, followed by a practice, might be inductive of.

The remaining ground for the success of this application to the court is the Constitution. By it "the Governor shall have power to grant reprieves and pardons after conviction, except in cases of impeachment." Here the power to grant a reprieve or pardon is unquestionably given to the Governor. But this power would be given in vain, unless an opportunity was given for its exercise by him. The means of exercising the power must also then come within the Constitution, and be a constitutional right. The means, therefore, must be a right in the convicted citizen to be affronted by this court, in those cases where the final judgment after conviction, is rendered thereupon. This right must, of necessity, supersede the immediate execution of the judgment, or the carrying the same into effect, as far as is reasonably necessary, under the circumstances, for its exercise, or the making application to the Governor.

It is asked from this court by the plaintiff in error, as a means of enabling him to exercise his constitutional right to suspend, until the next term of this court, the execution of the judgment, and in the meantime to admit him to bail.

For this admission to bail, his counsel have cited and relied upon Hawkins, P. C. book 2, ch. 15, sec. 40, where it is said: "Also it seems that the Court of King's Bench, or justices of jail delivery may bail a person convicted of manslaughter before such justices (speaking of justices of jail delivery) against plain evidence, in order to purchase his pardon in the meantime."

This court have little doubt but that in cases of manslaughter the execution of the judgment ought to be suspended, for the burning in the hand is the most important part solicited as the object of pardon, which, if inflicted, the benefit of the privilege would be much impaired.

That time should be given him here for making the application is more necessary than in England; for there a pardon may be applied for before the conviction, and is often granted; but here, by the Constitution, the pardon cannot be granted until after the conviction.

No reason has been shown, or even offered, why, in this case bail should not be taken for the forthcoming of the party, at the time that may be directed by the court; and in common cases, where the party can give bail, reasonably to secure his appearance that he may be forthcoming, and subject to the sentence of the law, is all that the law requires. If bail cannot be given, or, what is the same thing, sufficient bail, then it would be the duty of the court to direct him to be kept in jail for safe custody during the time allowed for the procuring of his pardon.

Let execution of the judgment in this case be suspended until the further order of this court, except as to the costs, for which an execution may now issue; and that the plaintiff in error enter into a recognizance, himself in the sum of \$5,000, with five securities, each in the sum of \$1,000, that he will appear, etc.

STATE EX REL. STAFFORD V. HAWK, WARDEN.

47 W. Va. 434—34 S. E. Rep. 918.

Decided January 27, 1900.

REPRIVE: *Governor's power derived from the common law; and his action in granting a reprieve not subject to judicial review.*
JUDICIAL REPRIVES: *Power of courts to grant reprieves and positive duty to do so, when the interests of justice demand such action.*

1. The power to reprieve in all cases of felony is vested in the Gov-

error of this State, by the Constitution thereof, where the necessity therefor exists. He is the sole judge of such necessity, and his conclusions are not reviewable by the courts, but are binding on the other departments of the Government.

2. A person convicted of a felony in a Circuit Court is entitled to have the execution of judgment suspended until a reasonable time after the next regular term of the Supreme Court of Appeals, that he may make application thereto for a writ of error. (Syllabus by the court.)

Supreme Court of Appeals of West Virginia.

Mandamus by the State, on the relation of J. L. Stafford, against S. A. Hawk, warden of the penitentiary. Denied.

Vinson & Thompson and *John Marcum*, for relator.

Edgar P. Rucker, Attorney General, and *E. W. Wilson*, for respondent.

DENT, J. To a writ of *mandamus nisi* requiring the warden of the penitentiary to receive and confine therein Elias Hatfield, Jr., convicted in the Circuit Court of Mingo County for murder, and sentenced to imprisonment for twelve years, the return is made that the Governor had granted a reprieve for thirty days to permit the prisoner to apply to this court for a writ of error. To this return the relator demurs as insufficient, on the sole ground that the Governor has no power to reprieve except in capital offenses. Section 10, art. 7, of the Constitution provides: "The Governor shall have power to remit fines and penalties in such cases and under such regulations as may be prescribed by law; to commute capital punishment, and, except where the prosecution has been carried on by the House of Delegates, to grant reprieves and pardons after conviction." The power to pardon necessarily includes the power to reprieve or suspend the sentence until the matter can be inquired into and determined. At common law the power to reprieve was lodged in the Courts, as the representatives of the King, he being considered the very fountain of justice; and he was never called upon to exercise it except in capital cases of necessity. All offenses were deemed offenses against the king. "It is reasonable that he only who is injured should have the power of forgiving." 1 Cooley, Bl. (3d Ed.) 268. Because the king was never personally called upon to exercise the power of reprieve, owing to the authority

delegated by him to his courts, except in capital cases, has grown up the theory that he had no such power. Almost all offenses in England in its early history were capital, the number being not less than 160. The king was kept so busy in capital cases that minor offenses or misdemeanors were intrusted to his courts, justices, and magistrates. That he had the power to reprieve or suspend sentence in any case of necessity, there cannot be the least doubt. The Governor of this State is clothed with the King's prerogative in this respect, except wherein it is plainly limited by the Constitution. Hence he has the power to reprieve in all cases of felony where necessity requires his intervention. Of this necessity he is the sole and final judge, and his conclusions are not reviewable by the courts. In such cases as the present, while the power exists, the necessity of its exercise should be avoided by the trial court, as provided by law, postponing "the execution of its sentence until a reasonable time beyond the first day of the next term of the Supreme Court of Appeals." Section 2, c. 160, Code. This necessarily means a regular term fixed by statute. The time granted should be sufficient for the proper preparation of the record and presentation of his petition to the Supreme Court. The time in this case, without regard to the terms of the Supreme Court, was fixed at sixty days—ordinarily a sufficient time; but, owing to some unusual delay on the part of the stenographer, which remains without reasonable explanation, the time, by no fault of the prisoner, proved insufficient. The prisoner was therefore justly entitled to an extension of the time. The trial court might have granted it, thus correcting its error, not judicial in its character, on motion of the prisoner, and of which no one could have complained. Even if it were judicial error, the prisoner would be bound by it, as committed at his instance, for his benefit. *Fults v. State*, 2 Sneed, 232. If the Circuit Court refused to make the correction on proper application, this court would have either compelled it to do so, or corrected its error. This would have taken away the necessity for executive interference, provided it could have been accomplished without delay. Doubts of power, procrastination of various kinds, and even unavoidable delays, in a case of this character, rendered the interference of the executive a necessity, as being more effective and prompt than an application to the courts. This, however, should be a warning

to the Circuit Court to grant to persons convicted of felony the reasonable time provided by statute, and compel its officers to discharge their duties so as to facilitate, instead of delaying, their applications for writs of error to this court. Neither a court nor any of its officers should be permitted to indirectly deprive a prisoner of his statutory rights. If innocent, he should not be subjected to punishment unjustly; and, if guilty, his punishment should be in accordance with law.

Denied.

NOTES (By J. F. G.)—JUDICIAL REPRIEVES: As to this subject we will simply give the following authorities as they appear in the books:

ANONYMOUS.

2 Dyer 205.

(In the reign of Queen Elizabeth.)

It was moved by the justices of assize there, if a thief be condemned to be hanged, and yet the justices command the sheriff to respite his execution for six weeks only; and after the sessions adjourn in vacation before the six weeks expire, the said justices command the sheriff to respite the execution still longer, *quaere*. Whether they can do this, because their commission of gaol delivery seems to be finished by the adjournment; and it is usual to have a new commission every time they come to the sessions of gaol delivery. And yet by the opinion of all the justices the order of further respite is good enough; and the custom of the realm has always been so; and the case of allowance of clergy under the gallows proves this; also the statute *de Finibus* (c. 3.) at the end in the 27th year of *Edw. 1.* gives authority that the justices of assize, if they are both layman, without any commission of gaol delivery may remain in the country to deliver the gaol. And also the penning and letter of the statute of 1. Ed. 6. (c. 7.) of the demise of the king, which speaks of the alteration of the justices proves this, "as if the said justices had continued."

HALE'S PLEAS OF THE CROWN.

CHAPTER LVIII.

CONCERNING REPRIEVES BEFORE AND AFTER JUDGMENT.

Reprieves, or stays of judgment or execution, are of three kinds, viz:

I. *Ex mandato regis*, thus we find it done in 3 H. 7. 7. a. *tho ore tenus*, or by some message, or by sending his ring, but at this day it is ordinarily signified by the privy signet, or by the master of requests.

II. *Ex arbitrio judicis*. Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; and sometimes after judgment, if it be a small felony, tho out of clergy, or in order to a pardon or transporation. *Crompt. Just. 22 b.* and these arbitrary reprieves may be granted or taken off by the justices of gaol-delivery altho their sessions be adjourned or finished, and this by reason of common usage. *Dy. 205 a.*

III. *Ex necessitate legis* which is in case of pregnancy, (e) where a woman is convict of felony or treason. *Co. P. C. 17. Stampf. P. C. Lib. III. cap. ult.*

1. *Enseinture* is no ground to stay judgment, and therefore if a woman convict be asked what she can say why judgment should not be given, *enseinture* is no cause of stay; but when judgment is given, she ought again to be demanded why execution should not be made, and there she may allege *enseinture in retardationem executionis*, *22 Assiz. 17. Coron. 180.*

(e) Thus it was by the civil law. *Dig. Lib. XLVIII tit. 19 de poenis l. 3* and also by the laws of William the conqueror *l. 35 vide Bract. de Coron. cap. 32 § II Fleta Lib. I cap. 38 § 15 vide Part I p. 368.*

2. *Enseinture* is no cause to stay execution, unless she be *enseint* with a *quick* child, or which is all of one intendment, if she be *quick* with child. *22 Assiz. 71 Coron. 180.*

3. When this is objected in delay of execution, it ought to be inquired of by a jury of twelve discreet women, and their verdict is to be recorded, and according as they give it the execution is to proceed or stay. *Ibid.*

This privilege is to be allowed but once, for if she be a second time with child, she shall not thereby delay execution, but the gaoler shall be punished for not looking better to her. *12 Assiz. 11. Coron. 168. 23 Assiz. 2. Coron. 188.*

If she be *priviment enseint* and not *quick* with child, and only so found by the jury of women, that is no cause of respite; but I have rarely found but the compassion of their sex is gentle to them in their verdict, if there be any colour to support a sparing verdict.

6. This reprieve is or ought to be a matter of record, and therefore I have always taken it, that altho she be delivered before the next sessions, yet the sheriff ought not to make execution after her delivery, neither ought the judge to give such direction upon the reprieve granted, but at the next session the woman must again be called to show what she can say why execution should not now be made, and she is to be heard *12 Assiz. 11. Coron. 168, amesne al barre*, for it may be the *tempus praestitutum* for her delivery since the last session is not yet past, and she must stay till then, or it may be she hath since had the king's pardon, which the sheriff cannot allow or judge of.

And therefore the books tell us, that after her delivery she was

brought to the bar again to show what she could say why execution should not be made; this bringing to the bar must needs be at a second or following sessions. 12 *Assiz.* 11. *Coron.* 168. 22 *E. 3. Coron.* 253.

MILLER'S CASE.

9 Cowen 730.

ALBANY, 5th February, 1828.

SIR:

I received in due season from you, as presiding judge of a court of oyer and terminer, held in and for the city and county of New York, minutes of the trial of William Miller, on the 10th of December last, for the murder of David Ackerman, by which it appears that he was duly convicted of the crime, and sentenced to be executed on the 26th of January last. After an attentive perusal and deliberate consideration of this and the accompanying documents, and of the papers sent up by Mr. E. King, one of the counsel assigned for the prisoner by the court, and several conferences with Mr. R. Emmet, the other counsel, I came to the same conclusion with the court and jury, that the prisoner was guilty, and that therefore the executive ought not to interfere in his favor. This decision I communicated to Mr. Emmet on the morning of the 19th *ultimo*, as my definitive determination. Shortly after, on opening some letters on my table, I found a communication from you and a duplicate relative to this subject, in which you announced a change of your views, and assigned your reasons. I then mentioned to Mr. Emmet that I would look over your communication and re-consider the case, and inform him of the result on Monday; at which time I told him that I could not reconcile it with my sense of duty, and my views on the subject to interpose, either by a change or remission of the punishment, and that the law must take its course. On the same evening I wrote a letter of a similar import to the Rev. Mr. Stanford, chaplain of the prison, in answer to one received from him, so that the convict might be prepared as far as possible for the awful fate that awaited him. On the evening of the 27th January, I received, to my great surprise, a letter from you informing me that the court of oyer and terminer had considered it their duty to relieve the convict until the 16th of this month. On taking the subject into consideration, I have no doubt that the court with pure motives, mistook their powers; and my only object in making this declaration is to prevent the act to which I except, from being drawn into precedent. The Constitution entrusts the governor with power over reprieves and pardons, and I think that, from the very terms, it is exclusive. The power claimed in this case by the court over which you preside, has never been exercised before in this country; it is incompatible with the arrangements of our Government; against the Constitution; and pregnant with the most mischievous results. It has been claimed in extraordinary cases in England; but the great commentator who concedes it, qualified the concession by saying that

It is rather by common usage than by strict right. The judges are emanations of the regal power; and even the king himself, in his regal office, though not in person, is always present in the eye of the law, in all his courts. Our Government is divided into three great departments, legislative, executive and judicial. Our judiciary, as well as the others, must look for its powers in the grants of the Constitution. Now, it must be admitted that the power that reprieves or pardons, is an executive power expressly delegated; and, however it may be represented in Hale, Hawkins and Blackstone, they can be of no authority on this occasion. There may be emergent cases in which reprieves or pardons ought to be granted; in cases of pregnancy, insanity, or unexpected discovery of innocence. In these cases, if the executive power cannot operate, in all probability, the sheriff, relying on the justice of his country, might take the risk upon himself, and without any pretense of authority, exercise mercy, upon indeed an awful responsibility. But this case is a different one; it is a claim of right; and the pernicious consequences to which it may lead are obvious. There is a court of oyer and terminer in every county, and there are 56 counties. Admit the power over reprieves to be in 56 courts; admit that these courts are more or less trustworthy, more or less liable to deception: may they not in many cases prostrate justice, and adopt measures of the most injurious tendency? The power of the executive may be completely overthrown in this respect; for, if a court may respite for a day, they may for a year; and if on the exhibition of new testimony, they may try over the criminal, and declare him innocent, whom before they had pronounced guilty, and act as a respiting power, there will be no certainty in punishment; a virtual pardoning power will be established in each county, instead of one express pardoning power for the whole State! And, if the judiciary be exposed to sudden and powerful attempts on its humanity, as is probable in the present case, to suspend the sentence of the law, what must be the effect on the executive, when it comes before him, backed by judicial authority; prevalent sentiment against the punishment of death; a reluctance in the firmest minds to accede to it; plausible reasons for a milder course; conflicting opinions about the right of infliction after an intermeddling with the sentence? Will not the executive, in almost every case, be compelled to change the punishment, And in the present instance, which has been pronounced by the judges and jury the crime of murder, and which I may still believe so, with all due reverence to the opinion of the court, I am compelled by the extraordinary circumstances, embarrassments and perplexities attending it to interfere with a conditional pardon: And as the course to which I except is obnoxious to so many objections, and may be productive of so many evils, and is without precedent, so I sincerely hope that it may be without imitation.

I have the honor to be, etc.,

DE WITT CLINTON.

The Hon. Judge Edwards.

Governor Clinton dying intermediate the date of his letter, and the following reply, was succeeded by the Lieutenant-Governor, to whom Judge Edwards' letter was therefore addressed.

To the Honorable Nathan Pitcher, Lieutenant-Governor of the State of New York.

NEW YORK, 22nd February, 1828.

SIR:

On the day ensuing the death of his excellency, the late Governor Clinton, I received by the mail a letter from him, respecting the proceedings of the judges of the court of oyer and terminer in this city, in reprieving for three weeks William Miller, who was under sentence of death. The Albany Argus, which was received by the same mail, contained a copy of the letter; and from the accompanying note of the editor, I presume it was published by the authority of his excellency. I forthwith prepared an answer; but before it was sent, received the melancholy intelligence of his death. As his letter proceeded from the executive department of the Government, and complained of an encroachment upon its power by the judges of the oyer and terminer, I conceived it to be my duty to state to you, as the present executive of the State, the views entertained by the judges respecting their power, and the facts which induced them to exercise it in the case in question.

Under the peculiarly delicate and painful circumstances in which I find myself placed, in consequence of the lamented death of his excellency, I shall endeavor to confine myself simply to an exposition as I conceive necessary to relieve the judges from the imputation of having acted illegally or indiscreetly.

I cannot but regret that his excellency did not seek a full exposition of the views of the judges, before he proceeded to the length of protesting against their acts; and above all before he gave such a protest to the press. Public discussion between different departments of the Government have a pernicious tendency, and ought never to be resorted to when they can be avoided consistently with a due regard to the public welfare. This, however, is a painful subject, and I should not have said so much, but from the conviction that my duty to the people and to my station, would not justify me in saying less. Were this whole subject one which concerned myself alone propriety, perhaps, under the peculiar circumstances, would require that I would be silent; but as it involves a point of law, which I conceive to be of vital importance; and as it affects the respectability of an important judicial tribunal, whose conduct has been publicly arraigned by the chief magistrate, silence on my part would be reprehensible.

His excellency stated, that on the 19th ultimo he received a letter from me, in which I announced a change in my views as to the guilt of the prisoner, and assigned my reasons: that thereupon he mentioned to Mr. Emmet, one of the counsel for the prisoner, that he would look over my communication and reconsider the case, and

inform him of the result *Monday*; at which time he told him that he could not reconcile it with his sense of duty and views of the subject, to interpose; and on the same evening, wrote a letter to that import to the Rev. Mr. Stanford, chaplain of the prison. He then proceeds to remark, that on the evening of the 27th of January he received, to his great surprise, a letter from me informing him that the court had considered it their duty to reprove the convict until the 16th of this month.

All this seems to import, what his excellency could not have meant, that the judges had reprovied the prisoner *with the knowledge of the fact* that the governor had refused to interfere after he had received my letter, and was fully possessed of all the facts in the case. Now, in the letter in which I informed him of the reprieve, I stated some very important additional facts, and informed him, at the same time, that the judges had no information of his having received that letter, either from his excellency, or from any other source, and that as well from circumstances, as from the non-acknowledgement of it by his excellency, the judges were of opinion that he had not received it. Even in his letter to Mr. Stanford, he made no mention of his having been recommended to mercy by me, or of the receipt of my letter. That the non-acknowledgement of an official letter so nearly concerning the life of a human being, alone warranted the conclusion that it had not been received, will not be questioned.

The question in issue is simply whether the judges have power of granting reprieves to such time (and such time only) "as is necessary to give room to apply to the executive for either an absolute or conditional pardon," when it is apparent that injustice would be done by suffering a sentence to be executed. Upon a thorough examination of the authorities, it appears to me that the law, true to the merciful spirit which pervades it, does, under such circumstances, make it the bounden duty of the judges to interfere.

In the reign of Queen Elizabeth the question was submitted to the king's bench, whether the justices of assize could, after the session had adjourned, lawfully command the sheriff to respite the execution still longer; and by the opinion of all the justices, the order for further respite was adjudged good enough, and they said that the custom of the realm had always been so. (2 Dyer, 205.)

Blackstone says, that "reprieves may be first *ex arbitrio judicis* either before or after judgment; as when the judge is not satisfied with the verdict, or the evidence is suspicious, etc., or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon. These arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their session is finished and their commission expired. But this is rather of common usage than of strict right." (4 Bl. Com. 394.)

Lord Hale says, that "although the judge, by whom judgment is given, ought to be very cautious in granting a reprieve of one condemned for *treason* before him, yet he may on due circumstances do

it, as well in case of treason as felony. And this reprieve he may grant, and after he hath granted it, may command execution after the sessions and adjournment of the commission." (1 Hale's P. C. 368.) He afterwards says, "and this by common usage."

Chitty says, "the more usual course is for a discretionary reprieve to proceed from the judge himself, who, from his acquaintance with all the circumstances of the trial, is most capable of judging when it is proper. The power of granting this respite belongs of common right to every tribunal which is invested with authority to award execution. And this power exists even in cases of high treason, though the judges should be very prudent in its exercise." (1 Chit. C. L. 617, 1st ed. 758.)

The law as here laid down is also sanctioned by Hawkins, P. C. B. 2, c. 51, s. 8, and various other writers.

These authorities leave no ground for question as to the common law upon the subject.

But it is alleged that this law had no application to this country, because in England the judges possess the power of reprieving in consequence of their being "emanations of the regal power; even the king himself, in his regal office, though not in person, being always present in the eye of the law in all of his courts." This reason is not given by the great and venerable expounders of the law; on the contrary, Chitty says, "the power of granting respites belongs, of common right, to every tribunal which is invested with authority to award execution."

Upon the abolition of the regal power in this country, the whole sovereignty became vested in the people; and their power to the extent they have delegated it, is with the judges here as the power is with them in England. In that country the power of the judges is limited and defined by law as well as in this. The source, therefore, from whence this power is derived, I apprehend makes no difference as to its extent.

But it is alleged that Blackstone qualifies his concession by saying that it is rather of common usage than by strict right. The qualification is however confined to cases where the session is finished, and the commission of the judges expired. In support of this he quotes 2 Hale, 415, who says simply, "and this by reason of common usage." Hale quotes the case of Dyer, above stated, where all the judges say that "The custom of the realm has always been so." If the custom of the realm had *always* been so, by necessary consequence it had become the common law of the realm.

Now, as it is expressly declared by the Constitution of this State, that such parts of the common law as did form the law of the colony of New York in April, 1775, shall be and continue the law of this State, except so far as it is *repugnant* to the Constitution; and, as when the courts of oyer and terminer were organized, they necessarily became vested with all the common law incidents of such courts, subject to the foregoing restrictions; and, as the judges of the oyer and terminer, by the common law, do possess the power

of reprieving, it follows that their power, unless *repugnant* to the Constitution, is sanctioned by it; and this brings me to the remaining question, which is, whether this power is *repugnant* to the Constitution? Upon this point his excellency made use of the following expression: "The Constitution entrusts the governor with power over reprieves and pardons; and I think, from the very terms *it is exclusive*."

As this is the point on which the whole question turns, I regret that his excellency did not favor the public with his reasons; but has simply given an expression of his opinion.

Although the executive power is declared to be in the governor, yet the power of reprieving, in its *own nature*, is no more an *executive* than a *judicial* power. It is no more an executive power than that of awarding execution, which is an order consequent upon the judgment of a competent tribunal, that the prisoner ought to be executed; and the case of a reprieve is only an order consequent upon a judgment, that he ought to be respited. And although the executive power is declared to be in the governor, yet he has no power beyond what is specifically enumerated in the Constitution. A contrary doctrine would invest him with all the powers of the crown. All the power of the governor, as it respects reprieve is contained in these words in the Constitution, viz.: "The governor *shall have power* to grant reprieves and pardons after conviction for all offenses, except," etc.

General Hamilton, in the 82d number of The Federalist, upon the subject of exclusive delegation of authority to the General Government, remarks that "this *exclusive* delegation can exist only in three cases; where an exclusive authority is in express terms granted to the Union; or where a particular authority is granted to the Union, and the exercise of a like authority is prohibited to the States; or where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible. Though these principles may not apply with the same force to the judiciary as to the legislative power, yet I am inclined to think they are, in the main, just with respect to the former as to the latter. And under this impression I shall lay down as a rule, that the State courts will *retain* the jurisdiction that they now have, unless it appears to be taken away in one of the enumerated modes." These remarks are equally applicable to power delegated by our Constitution, which is the law paramount of the State, as to the power delegated by the Constitution of the United States, which is the law paramount of the Union.

Now as the words of the Constitution are, not that he shall have *exclusive* power; nor even *the* power which might imply *the whole power*; but it is more guarded, and is simply "shall have power;" and as there are no express words excluding concurrent jurisdiction, nor any phraseology which implies that the *whole* power shall be vested in the governor, and as the Constitution has expressly declared that the common law shall be and continue the law of the State,

excepting so far as it is *repugnant* to the Constitution, it follows, that unless the power of the governor is of such a nature as to be repugnant to the qualified limited power claimed by the judges, their power remains; and that they do, as in the words of his excellency, look for their powers in the grants of the Constitution; and this as fully as if the Constitution had said that they should have all their common law powers in cases of reprieve, excepting so far as it is repugnant to the Constitution. That concurrent power can exist over the same subject-matter, and yet not be repugnant, is apparent. If, after the governor had reprieved, the court should order an execution, or if the governor had the power of ordering an execution, and should exercise it, and the judges should reprieve, then the interference of the judge would be an act repugnant to his power. But his power is of granting reprieves and pardons, and a temporary reprieve by the judges, "*so as to give room to apply to the executive,*" lays no barrier in the way of his executing his power in its most ample extent. It is, on the contrary, auxiliary to that power; and in the present instance, it afforded him an opportunity of doing, upon a new statement of facts what he forever would have been precluded from doing if the sentence had not been respited. It is solely for this purpose, and is so declared in the books; and to such extent only as is necessary "in order to give room to apply" to the executive to exercise his prerogative.

Far be it from me to call in question the wisdom of placing the power of granting reprieves and pardons in the executive. All that I contend for is, that although he indubitably has the ultimate or superior power, and that there is no power which can prevent him from reprieving, yet that there is nothing in the Constitution annulling the qualified limited power of the judges. Constitutions like laws should receive such a construction as will advance the remedy and suppress the mischief. The object of this provision is to enable the executive in all cases to prevent injustice. The limited power of the judges is only to remove an obstruction of their own creating, in the way of a mercy seat; a power necessary to enable the executive to exercise his prerogative upon every suitable occasion; a power which has been sanctioned by the experience of our ancestors for ages, and which was the offspring of the imperious dictates of justice and humanity. That which I contend against is a harsh and rigid construction of the Constitution, which would insure a haste in shedding blood, as foreign to the humane spirit of our criminal code as to the benign precepts of our religion. Even in England, notwithstanding the jealousy with which the crown has ever guarded its prerogatives, it has never been considered an encroachment. The argument that this power has not been before exercised in this State, is of no force, unless it can be shown that the judges have refused to exercise it upon suitable occasions. The non-exercise of a power does not annul it. It is true, as stated by his excellency, that courts may arrive at a conclusion that a prisoner is innocent, whom they before pronounced guilty; and if they should, it would be either in

consequence of new evidence, or on different views of the same evidence. If the former (as in the present case), there would be nothing extraordinary in it; and if the latter, it would only prove that their sense of justice rose superior to their pride of opinion.

In adverting to the history of our Government, I can discover nothing to warrant the inference that it was intended to divest the judges of this power. It certainly did not accord with the temper of the times when the Constitution was adopted, to invest the governor with more than kingly powers; nor to pay less respect to the safety of the citizen than was paid by the crown to that of the subject. Why, then, are we to presume that the convention intended to remove from the citizen a safeguard, to abrogate a power, which, in its operation in the mother country, had often been instrumental in preventing injustice? Why, when the want of such a power, might leave upon the land the stain of innocent blood?

But against the reasonableness of this construction, it is urged by his excellency, that there is a court of oyer and terminer in every county, and that this power of the courts might be abused to such an extent as completely to overthrow the power of the executive in this respect. Arguments against the exercise of power, because it may be abused, are of no legal validity. The law will not presume that its officers will abuse their trust. Were it otherwise, it might be shown by the same course of reasoning, that under the Constitution the courts have not the power of fixing the time of execution, for if they have, they might order the execution forthwith, which would oust the executive of his prerogative of pardoning, or they might order the execution at so remote a period, as would render his prerogative of reprieving of no avail. So, on the other hand, the executive, by the indiscriminate exercise of the pardoning power, might prostrate the criminal justice of the State.

But how stands the experience of the mother country, as it respects abuse arising from the number of courts of oyer and terminer? In England and Wales there are 52 counties, and of course 52 courts of oyer and terminer are annually organized in them.

Yet, immemorial experience has proved that no abuse has ensued from their powers. Surely it will not be contended that the framers of the Constitution considered our courts less trustworthy than those of England. Surely, after investing them with the most delicate, the most responsible of all power, that of passing upon the lives of their fellow beings, they would not hesitate to invest them with the power of deferring the execution of their own sentence so long as it would enable a miserable victim to seek the mercy seat, when the stern dictates of justice demanded it. Human nature revolts at the idea of executing one who has become a lunatic, a woman quick with child, or one whom subsequent developments have clearly shown to be innocent. And yet, if the exposition of the Constitution by his excellency is correct, all those consequences might ensue, provided the settled paramount law of the land is permitted to take its course.

But his excellency, realizing the necessity of the case, says, that

upon such exigencies, "In all probability, the sheriff, relying on the justice of his country, might take the risk upon himself, and, *without any pretense of authority*, exercise mercy upon, indeed, an awful responsibility." But the sheriff could not do this without violating his oath of office; he could not do it without trampling upon the authority of the judicial tribunals; he could not do it but by acting upon a principle which, if extended, would destroy the due subordination and harmony of government. But what if he should insist upon doing his duty as required by law? The moral sense of the whole community might be outraged at witnessing the execution of an innocent man; a scene, which of all others, would be most liable to excite them to tumult and outrage.

His excellency seems to have rested under the impression that the interference of judges in this case was "*by a sudden and powerful attempt upon their humanity*." I trust that a full development of the motives which governed them will show there was no want of becoming firmness upon the occasion, and that their conduct ought rather to be ascribed to a due regard to the rights of the prisoner and of the public justice of the land.

The evidence of the murderous disposition of the prisoner was derived mainly from the testimony of the boy, and the subsequent declarations of the prisoner.

In the deposition of the boy before the coroner of New York (which was not read at the trial), he swore, among other things, that the prisoner knocked the deceased into the boat alongside of the sloop, knocked him down again with his fist, stamped upon his face, and continued inflicting blows with his fist, sticks and stones, about half an hour; that he continued beating him from Fort Gansevoort to Spuyten Duyvel creek; that he then threw him overboard, and pulled him in again; that the prisoner then stamped upon him, and beat him with his fist, and struck him several severe blows with a handspike on his head and face.

In an examination before the judges on the day before the reprieve was granted, he stated that the prisoner struck the deceased more than one hundred blows with a handspike, sticks of wood, stones, ropes, and by kicking and stamping upon him. The two very respectable physicians who were examined on the trial, both said that they examined the body critically; that there were *no marks of violence excepting on the head, and there only three*, one under each eye, and that, which was the mortal one, on the right temple. This wound one stated "had an appearance as though produced by a club or falling on a stone." And the other one said, "that falling on a sharp edge, as the gunwale of a boat, would have done it." The statement of the physicians as to the *number of marks* being so totally inconsistent with those of the boy as to the number of blows, and being satisfied at the time of the reprieve, as well from personal examination of him, as from the testimony of his teachers, of the extreme imbecility of the boy, and also noticing various discrepancies in his testimony at different times, and the very improbable account which he gave of the whole transaction, it was not considered safe, or con-

sistent with the humane spirit of our laws, to repose any confidence in his testimony. The testimony of this witness, therefore, which was all the evidence of the shocking details of the case was laid aside.

As to the brutal declaration of the prisoner on board Capt. Green's vessel on surrendering himself, which was sworn to by one of the witnesses, and which bore powerfully against him on the trial, it does not appear from the deposition of Capt. Green, before the coroner of Westchester (but which was not read on the trial) that he made any such declaration, although he states what the prisoner did say. Two other men swore at the same time, that the statement made by Capt. Green was correct, and a third, that he was not present all of the time, but that it was correct as far as he heard it. Capt. Green was sick, and unfortunately not present on the trial. He has subsequently stated, in the hearing of Alderman Thorp, that the prisoner did not make use of a rash expression, but gave a reasonable account of the business. He also made statements which went in explanation of the declarations of the prisoner at Sing Sing. This came to the knowledge of the judges on the day the reprieve was granted. But as Green was then absent, his deposition was not taken.

Under these circumstances, as those witnesses were of course sworn to tell the truth, the judges could not in justice to the prisoner, visit upon him the declarations as testified to.

On the trial our attention was particularly directed to the inquiry, whether the deceased did not come to his death by being knocked into the boat. But one of the physicians stated, that in his opinion he could not have moved again after receiving the blow on the temple. This opinion bore strongly against the prisoner on the trial, because, after being knocked into the boat, he was again on board the vessel. Subsequently to the trial, however, a number of our most respectable physicians certified that he might have moved for some time after it.

The case, then, stripped of the inconsistent parts of the testimony of the boy, and the violent declarations of the prisoner, resolved itself mainly into this: that the deceased, who was a stranger to the prisoner, attempted to take the helm from him who had the command, and was thereupon knocked into the boat which lay alongside of the quarter deck, and received the mortal wound by the fall; and that afterwards the prisoner hailed Capt. Green's sloop, stated that he had a dead man on board, and had killed him in his own defense, surrendered himself a prisoner, and wished to be taken to New York for trial. And this would unquestionably be nothing more than manslaughter. There are other facts in the case; but, as I apprehend they do not, as far as satisfactorily attested to, materially vary the view I have taken, I shall forbear entering into a further enumeration, as the testimony was reported at length to the executive.

Upon a consideration of all the circumstances, the judges and the district attorney were of opinion that the evidence, taken in connection with the facts subsequently disclosed, was not such as would

justify the execution of the prisoner; and he was reprieved to such time as would enable the executive to become fully informed of the case, and afford him an opportunity of exercising his prerogative, if he should deem it proper.

Believing, as it was natural we should, that the new facts and views, which had wrought so radical a change in the minds of the judges and of the district attorney, would at least have created so much doubt in the mind of his excellency as to the guilt of the prisoner, as would, in the humane spirit of our laws, have rendered his execution unjustifiable, it was with much surprise that I learnt upon perusing his excellency's letter, that, to use his own expression, "he might still believe him guilty of the crime of murder," and that he was compelled "by the extraordinary circumstances, embarrassments, and perplexities, arising from the reprieve by the judges, to interfere with a conditional pardon." Or, in other words, that the reprieve, his excellency would have suffered the prisoner to have been executed. How the dispensing with the execution could have been necessarily consequent upon the reprieve, I do not distinctly apprehend; for his excellency himself, in the case of Diana Selick in this city, reprieved her for a limited period, and then suffered her to be executed. In the mother country, reprieves are not considered as giving any claims for pardon; and executions after them have frequently taken place. In the case of Miller, no difficulty was created as respected the prisoner, by the reprieve of the judges; for he was given distinctly to understand that he was not to infer from it that the governor would interfere; that it was merely the act of the judges to give the governor time to look into the case, and afforded no indication of what might be his opinion.

I have now given a full expression of the views of the judges, both as to the law and the facts. It was under these circumstances, and resting under a conviction that upon his excellency being fully informed of the case, he would conceive it to be his duty to reprieve, that we were reduced to the alternative of their suffering the prisoner to be led out to execution, or of reprieving him.

But reverse the picture. Suppose that the judges had refused to reprieve, and the governor, upon being fully informed of the case had, in pursuance of their expectations conceived it to be his duty to reprieve him, but that the prisoner had in the meantime been executed! What judgment would a moral community have then formed of their conduct?

In conclusion, I consider it my duty to state, that I realize most sensibly the delicacy, the novelty of the situation of an important judicial tribunal being arraigned by the chief magistrate at the bar of the public. Under no ordinary circumstances would I be brought to consider it as consistent with a due respect to the dignity of the court over which I have the honor to preside, or to the sovereignty of the people who placed me there, and whose laws are there administered, to answer to such a call. But, as it was the chief magistrate who has thus arraigned them, on a charge of encroaching upon

his constitutional powers, and an intimation that, in the case in question, they probably acted under the impulse of feeling, instead of the guidance of judgment; and as the tone of his letter seems to imply that he possessed the *exclusive* power of expounding the Constitution, so far as it respects the powers of the executive, I could not reconcile silence to my sense of duty.

By the arrangements of our Constitution, the judicial tribunals are bound to expound the Constitution and laws, according to the best of their own judgment; and in the discharge of their trust, know no superior controlling power but the courts of superior jurisdiction and the Legislature. And although they will always carefully endeavor to keep within the scope of their powers, and will ever pay due respect to any suggestions from the executive as to the bearing of their decisions upon his prerogatives, yet in the discharge of their duties, I trust they will ever look, and look solely, to the Constitution and laws for their government, and will never hesitate to follow where they and justice lead the way.

I have the honor to be, very respectfully, your obedient servant,
OGDEN EDWARDS.

For the doctrine subsequently announced by the New York Court of Appeals, see next case.

PEOPLE EX REL. FORSYTH V. THE COURT OF SESSIONS OF
MONROE COUNTY.

141 N. Y. 288—*36 N. E. Rep. 386—23 L. R. A. 856.

Decided February 27, 1894.

REPRIEVE: *Inherent power of courts to suspend sentences distinct from executive power to grant pardons and reprieves—Statute in relation thereto construed and held to be constitutional.*

1. The power to suspend sentences has always been an inherent judicial power and is totally distinct from the executive power to grant pardons and reprieves, which is by the Constitution vested in the Governor.
2. The framers of the Federal and State Constitutions were familiar with the principles governing the power to grant pardons, and conferred it on the executive with full knowledge that it was the same as exercised by the English crown and its representatives in the colonies, and did not regard executive power to

* Although this case ante-dates the period covered by this volume, its special value gives it place.

grant pardons and reprieves as an encroachment on the common-law power of the judiciary to suspend sentences.

3. A statute which by its terms authorizes courts to suspend sentences, a power inherent in the courts at common law, is a valid exercise of legislative power under the Constitution.
4. Although such statute is valid in authorizing temporary suspensions, it cannot authorize courts to bind themselves, so that the proper punishment cannot be inflicted when the public justice requires such action.

New York Court of Appeals.

Appeal from an order of the General Term of the Supreme Court in the Fifth Judicial Department, made January 18, 1893, affirming an order of the Special Term granting a writ of peremptory mandamus. Reversed.

H. B. Hallock, for the appellant.

Fred C. Hanford, for the respondent.

O'BRIEN, J. The question presented by this appeal is novel and important. The Supreme Court has by mandamus commanded the Court of Sessions to proceed to judgment in a criminal case and to pass sentence upon the defendant after conviction. The power of the court to grant the writ under the circumstances disclosed by the record is denied.

On the 4th of March, 1892, John Attridge was convicted in the Court of Sessions of Monroe County, composed of the county judge and two justices of the sessions, upon his own plea of guilty, of the crime of grand larceny in the second degree. The defendant was a clerk in a mercantile firm and the offense consisted in the appropriation to his own use of a sum of money which belonged to his employers and which came into his possession or under his charge by virtue of his employment. There were supposed to be certain mitigating circumstances connected with the transaction, growing out of his youth, previous good character and otherwise, that were presented to the court through a petition signed by numerous respectable citizens, who prayed that his sentence be suspended. Three days after the conviction he was brought before the court and, the county judge presiding, sentenced him to imprisonment. The two justices of the sessions dissented and announced as the judgment of the court that the sentence be suspended. The defendant was remanded to the custody of the sheriff but

discharged soon after from the commitment upon *habeas corpus*, granted by a justice of the Supreme Court holding a court of Oyer and Terminer, on the ground that the sentence pronounced by the county judge, not having been concurred in by the majority of the court, was illegal. He was, however, remanded to the custody of the sheriff, to the end that the Court of Sessions might pronounce a legal sentence in the case. He was again brought before that court on the 14th of March and the judgment thereupon given that sentence be suspended during good behavior. The county judge dissented, and the defendant was thereupon discharged from custody. On the 27th of June following, the Supreme Court at Special Term, upon the application of the District Attorney, granted a peremptory writ of mandamus commanding the Court of Sessions to proceed to judgment and to sentence the defendant to the punishment prescribed by law. The order granting the writ has been affirmed at the General Term.

The precise question involved, therefore, is the power of a court of record, possessing jurisdiction in criminal cases, to suspend judgment after conviction. The Court of Sessions is a court possessing superior criminal jurisdiction and common-law powers. (*People v. Bradner*, 107 N. Y. 1.) It possesses all the powers formerly exercised by superior courts of criminal jurisdiction in England, except so far as these powers have been changed or abrogated by statute. There can, I think, be no doubt that the power to suspend sentence after conviction was inherent in all such courts at common law. The practice had its origin in the hardships resulting from peculiar rules of criminal procedure, when the court had no power to grant a new trial, either upon the same or additional evidence, and the verdict was not reviewable upon the facts by any higher court. The power as thus exercised is described in this language by Lord Hale: "Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment is insufficient, or doubtful whether within clergy. Also when favorable or extenuating circumstances appear and when youths are convicted of their first offense. And these arbitrary reprieves may be granted or taken off by the justices of gaol delivery, although their sessions be adjourned or finished, and this by reason of common usage." (2 Hale P. C. ch. 58, p.

412.) This power belonged of common right to every tribunal invested with authority to award execution in a criminal case. (1 Chitty Cr. L. [1st ed.] 617, 758.)

Without attempting to collate all the authorities on the subject, it is sufficient to say that the power to suspend sentence at common law is asserted by writers of acknowledged authority on criminal jurisprudence, by the uniform practice of the courts and numerous adjudged cases. (2 Hawk. P. C. ch. 51, sec. 8; 1 Bishop's Cr. Pro. sec. 1124; 4 Bl. Com. ch. 31; *People v. Graves*, 31 Hun 382; *People v. Harrington*, 15 Abb. N. C. 161; *People v. Whipple*, 9 Cow. 715; *Carnal v. People*, 1 Park. Crim. Repts. 262, 266; *Commonwealth v. Dowdican*, 115 Mass. 136; *State v. Addy*, 43 N. J. L. 114; *Weaver v. People*, 33 Mich. 297; *People v. Reiley*, 53 *id.* 260; *Commonwealth v. Maloney*, 145 Mass 205; *Sylvester v. State*, 65 N. H. 193.) The courts below were of the opinion that section twelve of the Penal Code deprives the court in all cases of any discretion with respect to the imposition of the punishment prescribed by law. The language of that section is as follows: "The several sections of this Code which declare certain crimes to be punishable as therein mentioned devolve a duty upon the court authorized to pass sentence to impose the punishment prescribed." This provision was not intended to, and did not, abrogate any power over the judgment which the court possessed before. The provision is declaratory of the law as it always existed, for it was always the duty of the court to impose the punishment upon conviction, but this duty was never supposed to be inconsistent with the power to suspend the judgment till the next term of the court or indefinitely. Since the granting of the writ in this case the above section of the Penal Code has been amended by chap. 279 of the Laws of 1893, by adding to it these words: "But such court may, in its discretion, suspend sentence, during the good behavior of the person convicted, where the maximum term of imprisonment prescribed by law does not exceed ten years, and such person has never before been convicted of a felony." It is admitted by the learned District Attorney that this amendment though passed since the writ in this case was directed by the order, is applicable to this case, as the defendant in the indictment has not yet been sentenced, and, if brought before the court for that purpose, pursuant to the command of the

writ, sentence may be suspended if the enactment is valid. He meets this difficulty, however, by strenuously insisting that the amendment encroaches upon the power of the Governor to grant reprieves and pardons, which is exclusively invested in him under the Constitution. (Con. art. 4, sec. 5.) There can be no doubt that if the amendment distributes any part of the pardoning power conferred upon the executive to some other department of the Government, the legislation is in conflict with the Constitution and invalid. The power to suspend sentence and the power to grant reprieves and pardons, as understood when the Constitution was adopted, are totally distinct and different in their nature. The former was always a part of the judicial power. The latter was always a part of the executive power.* The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when the judgment is rendered. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out the existence of guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities and restores him to all his civil rights. It makes him, as it were, a new man, and gives him new credit and capacity. (*Ex parte Garland*, 4 Wall. 333; *U. S. v. Klein*, 13 *id.* 128; *Knote v. Garland*, 95 U. S. 149.)

The framers of the State and Federal Constitutions were perfectly familiar with the principles governing the power to grant pardons, and it was conferred by these instruments upon the executive with full knowledge of the law upon the subject, and the words of the Constitution were used to express the authority formerly exercised by the English crown, or by its representatives in the colonies. (*Ex parte Wells*, 18 How. 307.) As this power was understood it did not comprehend any part of the judicial function to suspend sentence, and it was never intended that the authority to grant reprieves and pardons should abrogate or in any degree restrict the exercise of the power in regard to its own judgments that criminal courts had so long maintained. The two powers, so distinct

*This statement is misleading. At common law a judge had the power to grant a reprieve or respite. See the last case.—J. F. G.

and different in their nature and character, were still left as they were before, the one to be exercised by the executive and the other by the judicial department.

We, therefore, conclude that a statute which in terms authorizes courts of criminal jurisdiction to suspend sentence in certain cases, after conviction, a power inherent in such courts at common law, which was understood when the Constitution was adopted to be an ordinary judicial function, and which ever since its adoption has been exercised by the courts, is a valid exercise of legislative power under the Constitution. It does not encroach in any just sense upon the powers of the executive as they have been understood and practiced from the earliest times. The power to suspend the judgment during good behavior, if understood as expressing a condition, upon the compliance with which the offender would be absolutely relieved from all punishment and freed from the power of the court to pass sentence, is open to more doubt. The Legislature cannot authorize the courts to abdicate their own powers and duties or to tie up their own hands in such a way that after sentence has been suspended they cannot, when deemed proper, and in the interest of justice, inflict the proper punishment in the exercise of a sound discretion. Nor can the free and untrammelled exercise of this power or the right to pass sentence according to the discretion of the court be made dependent upon compliance with some condition that would require the court to try a question of fact before it could render the judgment which the law prescribes. The statute must not be understood as conferring any new power. The court may suspend as before, but it can do nothing to preclude itself or its successors from passing the proper sentence whenever such course seems to be proper. This, we think, is all the statute intends, and that was the only effect of the judgment. It is a power which the court should possess in furtherance of justice, to be used wisely and discreetly, and it is perhaps creditable to the administration of justice in such cases that while the power has always existed no complaint has been heard of its abuse. The order of the General and Special Terms should be reversed and the mandamus denied.

All concur.

Orders reversed.

NOTE (By J. F. G.)—We cannot see any marked distinction between

a reprieve and a suspension of sentence. At common law the terms "reprieve" and "respite" were used, while the American judges claim to simply grant suspensions of sentences. In either case the power comes from the same source.

WATSON v. STATE.

81 Miss. 700—33 So. Rep. 491.

Decided February 16, 1903.

RIGHT OF THE DEFENDANT TO HAVE HIS WITNESSES PRESENT IN OPEN COURT: *Motion for continuance because of absence of the only witness not related to the defendant—Motion overruled because the prosecuting attorney admitted that the witness would testify as claimed by the defendant—Error—Threats, by the deceased, communicated or uncommunicated.*

1. In a murder case, where there is a conflict in evidence as to whether the accused or the deceased was the aggressor, threats by the deceased, communicated or uncommunicated, are admissible to show the character of the homicide.
2. The only witness, not related to the accused, who knew of such threats, was subpoenaed, but was sick with the smallpox. The defendant moved for a continuance, which motion was overruled upon the prosecuting attorney admitting that the witness would, if present, testify as claimed by the defendant. *Held*, that the defendant was entitled to have the witness personally present at the trial, and, that the motion for a continuance should have been granted.

Supreme Court of Mississippi.

Appeal from the Circuit Court of Calhoun County; Hon. W. F. Stevens, Judge.

J. E. Watson, convicted of manslaughter, appeals. Reversed.

At the first day of the March Term, 1902, the case was called for trial; but it was discovered that one of the accused's witnesses, named Stewart, who had been *subpoenaed*, was absent. The clerk produced a physician's certificate to the effect that Stewart had the smallpox. The defendant then asked for compulsory process for the witness, which the court refused, remarking—that, even if it could be served, a witness,

afflicted with the smallpox, would not be permitted in the courtroom. Defendant then moved for a continuance, supporting the motion with his own affidavit, in which he stated that he expected to prove by Stewart that on the morning of his difficulty with Ashley, the deceased, the witness met Ashley and one Ivey, and that they asked Stewart if he had seen defendant, to which Stewart replied that he had, and, that Ashley said: "The damned scoundrel thinks he will get away from us, but I will show him;" that Stewart was the only witness, not related to defendant, by whom he could prove the threats. The District Attorney admitted that Stewart would so swear, and the motion was overruled. On the trial the defendant's mother and wife testified to threats made by Ashley.

Mitchell & Fletcher, for the appellant.

William Williams, Attorney General, for the State.

CALHOON, J. On a conflict of evidence as to who was the aggressor, recent threats by deceased, communicated or uncommunicated, are admissible to show the character of the homicide. B. & A.'s Digest, p. 321, clause 233. Such conflict appears sharply in this record. The testimony of Stewart, the only witness to the threats who was not related to the accused, was quite important to him, and he had the right to his personal presence before the jury, and to compulsory process for him to the next term of the court; it not being available to the trial term, and but one continuance being involved. *Scott v. State*, 80 Miss. 197; 31 So. Rep. 710; *Long v. State*, 52 Miss. 23. The threats were of the very day of the killing, and by deceased while in search of the accused.

Reversed and remanded.

WILLIAMS v. STATE.

44 Texas Crim. Rep. 494—72 S. W. Rep. 330.

Decided February 18, 1903.

RIGHT OF RAILWAY TRAINMEN TO CARRY WEAPONS: *A railway porter is a traveler.*

1. A railway porter is a traveler; and as such is permitted to carry a weapon.
2. A railway porter in actual charge of his work and guarding the interests of the passenger train, is considered as one at his place of business.
3. Where it was shown that a railway porter while in the performance of his duties, was threatened with an assault; and, that he carried a pistol for his own immediate defense, the court should have instructed the jury on the law authorizing travelers and persons at their places of business to carry weapons; and it was error for the jury to return a verdict of guilty of unlawfully carrying a pistol.

Court of Criminal Appeals of Texas.

Appeal from Limestone County Court; Hon. James Kimbell, Special County Judge.

Hamp Williams, convicted of unlawfully carrying a pistol, appeals. Reversed.

Howard Martin, Assistant Attorney General, for the State.

HENDERSON, J. Appellant was convicted of unlawfully carrying a pistol, and fined \$25; hence this appeal.

The evidence shows that appellant was a regular porter of the passenger train on the Houston & Texas Central Railroad running from Ennis to Houston, and that it was his duty, among other things, to look out for "bums," or persons stealing rides on the train, and to load and unload baggage at all stations, sweeping out cars, and generally to follow the directions of the conductor who was in charge of the train. He was also authorized, under instructions of the conductor, to keep all "bums" or persons who were not passengers of the train, or, if he found such persons on the train, to put them off. It was

also shown in evidence that persons stealing rides frequently gave trouble to the trainmen, and frequently, when they were put off, they threw rocks, sticks, pieces of coal, and other things at persons who put them off; and sometimes such persons were armed with pistols and knives. The conductor testified that on this account, when he knew or believed such persons were stealing rides on the train, he generally sent the porter and others of the train crew to make such persons get off the train. On the particular night in question, when the train approached Mexia, a number of persons were found to be stealing rides on the train, and the conductor sent appellant forward to make them get off the blind baggage. Twice, after the train stopped at the depot, it was stopped, in order to afford an opportunity to make such persons get off. Among these "bums" was the prosecutor, Luther Herod. When appellant went forward to clear the blind baggage of such persons as were intruding on the train, said Herod cursed appellant, and told him to "get away from here, you damn negro; I will cut your throat." Herod jumped down from the train at the front end of the car, and started toward appellant with a knife, as he testified; and appellant called to him not to come on him with that knife, and fired his pistol in the air, to scare him. The train then pulled out, but prosecutor, Herod, succeeded in getting on the train again. Bentley, one of the train crew, heard Herod say that he was going to kill defendant. This was communicated to appellant before they reached Groesbeck. When the train stopped at Groesbeck, appellant, as was his duty, went forward to help put the baggage on the car, and carried his pistol in his hand. As soon as he began to handle the baggage, Herod came up with something in his hand, which appellant took to be a knife or a pistol, but which in reality was a coupling pin. Appellant immediately called out to those around, "Take that man away from here." Herod replied, "You shot at me at Mexia, and I am going to kill you." Appellant insisted on the crowd taking the man away, at the same time holding his pistol in his hand, as he testified, in order to protect himself. At this juncture an officer, who happened to be at the train, interfered, and stopped the difficulty, and took appellant's pistol away from him. It was also shown that appellant generally carried his pistol on the train in a grip or valise, which he kept in one of the cars; that on this particular night, when instructed by

the conductor to keep the "bums" off the train, he got his pistol at Mexia, and kept it on his person from that time until after the trouble at Groesbeck. Appellant set up three defenses to the State's charge: (1) That he was a traveler, and as such had a right to carry a pistol; (2) that he had reasonable grounds for fearing an unlawful attack upon his person, and the danger was so imminent and threatening as not to admit of the arrest of the person about to make such attack, upon legal process; (3) that he was at his own place of business, and had a right to carry arms. In regard to his defense of being a traveler, we would reiterate what was said in *Bain v. State*, 38 Tex. Cr. R. 635; 44 S. W. 518—that under the general term "traveler," which means one who travels in any way, one who makes a journey, one who goes from place to place, appellant would seem to come under this definition; for going on a train every day some 150 miles would, in common parlance, constitute him a traveler. We are of opinion that appellant was both a traveler and was at his place of business at the time he is charged to have carried said pistol. His business constituted him a traveler, and he was engaged in his business while traveling, and that business required him to be alert, and at his post of duty, not only to protect the train against any interlopers or persons who were not authorized to ride thereon, but to aid in protecting the passengers themselves when called upon by the conductor in charge of the train. In our opinion, he had a right, both as a traveler and as being at his place of business, to carry a pistol. Appellant requested both of these issues to be submitted to the jury, but the court refused to entertain his request. In this, we think, there was error. The court did submit to the jury the issue as to whether appellant had been threatened, and was in imminent danger at the time he was shown to have carried the pistol. However, the jury found against him on this issue. In this, we think, the jury was at fault, as the testimony, in our opinion, unquestionably showed that in the performance of his duty he had offended prosecutor, Herod, who had threatened his life; and at the time appellant was discovered carrying the pistol Herod was in the act of making an onslaught on him with a coupling pin. As it transpired, his apprehension was well grounded; and the evidence further showed that he had

no opportunity to have applied to a peace officer. The jury should have found in appellant's favor on this issue.

The judgment is reversed, and the cause remanded.

STATE V. SLAMON.

73 Vt. 212—87 Am. St. Rep. 711—50 Atl. Rep. 1097.

Decided July 20, 1901.

SEARCH AND SEIZURE—CONSTITUTIONAL RIGHTS: *Unlawful seizure of a letter from the person of the accused, and, a subsequent unlawful use of it to impeach one of his witnesses at the trial—Declaration of Rights—Argument of counsel.*

1. In executing a search warrant that directed the officer to search the defendant's person for stolen goods, the officer took from him a letter. Subsequently at the trial, the letter was used to impeach its writer, who was one of the defendant's witnesses. *Held*, that the admission of the letter in evidence was reversible error.
2. The seizure of the letter was in violation of the Declaration of Rights of the Constitution of Vermont, prohibiting unreasonable search and seizure.
3. The introduction of the letter so obtained was in fact compelling the defendant to testify against himself.
4. Although the record does not in express terms state that the letter was taken from the defendant against his will, it is so considered, as it is the only fair inference from the whole record.
5. Comments of the defendant's counsel on the failure of the State to examine a witness, who had been sworn at the trial, rendered harmless, counter-comment on the failure of the defendant to examine such witness.

Supreme Court of Vermont.

Exceptions from Washington County Court; Hon. John H. Watson, Judge.

Frank Slamon, convicted of grand larceny, brings exceptions. Reversed.

Argued before TAFT, C. J., and ROWELL, TYLER, MUNSON, and START, JJ.

Richard A. Hoar, State's Attorney, for the State.

Fred B. Thomas, for respondent.

TAFT, C. J. 1. An officer had a search warrant to search the person of the respondent for stolen goods. When engaged in the search he found on the person of the respondent, and took from it, a letter written to the respondent by a person whom the latter improved as a witness, in the impeachment of whom the letter contained material testimony. Upon trial the State offered the letter in evidence, and it was admitted under objection and exception. The exceptions do not state in express terms that the letter was taken from the person of the respondent against his will, but we so construe them, as it is the only fair inference from the whole record.

The taking of the letter from the person of the respondent was a plain violation of the eleventh article of the Declaration of Rights, which provides "that the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure and therefore warrants without oath or affirmation first made, affording sufficient foundation for them and whereby any officer or messenger may be commanded or required to search suspected places or to seize any person or persons, his, her, or their property, not particularly described, are contrary to that right, and ought not to be granted." It is needless to discuss this question. We refer to the case of John Wilkes, of the North Briton, whose house was searched and his papers indiscriminately seized by virtue of a warrant issued by Lord Halifax, Secretary of State. In an action of trespass, Wilkes recovered £1,000 against Wood, one of the parties who made the search, and £4,000 against Lord Halifax. Also to *Entick v. Carrington*, 19 How. State Tr. 1029, and *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. These cases contain the reasoning and conclusions upon this question of the greatest courts of the English-speaking nations. It may be noted in this case that the letter in question was "not particularly described" in the warrant, and by virtue of the warrant the officer had no right to search for nor to seize it. The State's Attorney claims that the question of an illegal search is not in issue, for that the objection made on trial to the admission of the letter was that it was taken at the time of his arrest from his person and against his will, and did not make the objection that it was taken by virtue of a search warrant. The facts appearing that the letter was taken when the officer was engaged in serving the warrant, that the search

was made by virtue of the warrant, and that he found the letter when he was making the search, the objection and exception are broad enough to permit the respondent to raise the question of the illegality of the search. *State v. Mathers*, 64 Vt. 101, 23 Atl. 590, 15 L. R. A. 268, 33 Am. St. Rep. 921, is cited to sustain the claim of the State. That case involved the question of a confidential communication between husband and wife, in the form of a letter which the husband had handed to a third person to give his wife, but from whom it had been taken by one who passed it to the prosecuting officer. The court held the letter properly admitted, conceding that in the hands of the wife it would have been privileged, and said, "When papers are offered in evidence the court can take no notice of how they were obtained—whether legally or illegally, properly or improperly—nor will it form a collateral issue to try that question." In most instances this rule is applicable. It is generally considered immaterial how a paper passes into the possession of the one offering it in evidence. But this rule is subject to another rule which is applicable—that, when a party invokes the constitutional right of freedom from unlawful search and seizure, the court will take notice of the question and determine it. *State v. Mathers* was properly ruled, for the respondent voluntarily parted with the letter, and, having done that, it was immaterial how it was obtained by the prosecution. That case was in line with *State v. Center*, 35 Vt. 378, in which it was held that testimony was properly admitted that tended to show conversation between husband and wife which was overheard by the witness, the objection being made that it was privileged for the reason that the conversation was confidential. The case of *Barrett v. Fish*, 72 Vt. 18, 47 Atl. 174, 51 L. R. A. 754, is cited; but the question of an unlawful search and seizure was not in that case. The court, referring to the question, said, "The question is not involved, as the letters were voluntarily delivered to Howland by the agent of the oratrix." Although the court stated the general rule that it would not inquire into the question of how the party offering papers in evidence became possessed of them, as enunciated in *State v. Mathers*, *supra*, it is clear that the rule is subject to the limitation hereinbefore stated.

2. We also hold that the letter was inadmissible under Article 10 of the Declaration of Rights, which provides "That

in all prosecutions for criminal offenses no person can be compelled to give evidence against himself;" and that this ruling is correct is clearly manifest for the reasons stated in *Boyd v. U. S.*, hereinbefore cited. While it may be true that the respondent having improved himself as a witness, might be cross-examined in reference to any matter material upon any issue upon the trial it did not correct the wrong theretofore done him by the seizure of the letter in violation of his constitutional rights. The seizure of a person's private papers, to be used in evidence against him, is equivalent to compelling him to be a witness against himself, and, in a prosecution for a crime, is within the constitutional prohibition.

One Falgarano was summoned by the State and sworn as a witness, but was not called to testify by either side, and each party commented upon the failure of the other to call upon him. If it was error to so comment, it was equally so for one as for the other. The fault being at first with the respondent's counsel, the judgment should not be reversed because the State's Attorney was permitted to use an argument of the same tenor as that of the respondent. Whether either argument was improper, there is no occasion, therefore, for us to decide.

Upon inspection of the record, the court are of opinion that there was error in the proceedings, and the judgment and sentence of the County Court are reversed, and the cause remanded for a new trial.

FROST v. PEOPLE.

193 Ill. 635—86 Am. St. Rep. 352—61 N. E. Rep. 1055.

Opinion filed December 18, 1901.

SEARCH WARRANTS—CONSTITUTIONAL LAW—GAMING IMPLEMENTS: *Description of gaming implements in the warrant—Statute providing for seizure and destruction of gaming implements without trial by jury—General search warrant statute.*

1. A search warrant commanding the seizure of "gaming implements and apparatus" concealed on the second floor of a certain building is sufficiently definite in its description of the property to be seized.

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2. By providing that gaming implements and apparatus should be destroyed, after a hearing, under the direction of the judge, justice or court, the Legislature did not violate the constitutional provision respecting trial by jury, since trial by jury was never a right in summary proceedings.
3. The Legislature having declared, in division 8 of the Criminal Code, that the keeping gaming implements and apparatus is an offense against the law, such implements and apparatus are not lawful subjects of property which the law protects, but are liable to seizure, forfeiture and destruction without violating any constitutional provision, whether they were in use for gaming purposes when seized or not.
4. Even if section 2 of the act of 1895, concerning slot-machines (Laws of 1895, p. 156), were held unconstitutional in providing for the destruction of gambling devices without providing a way for determining the character of the property seized as a gambling device, yet proper proceedings to enforce such section could be had under division 8 of the Criminal Code, relating to searches and seizures. (Expressions in *Bobel v. People*, 173 Ill. 19, adhered to.)

Supreme Court of Illinois.

Writ of error to the City Court of Mattoon, Coles County;
Hon. J. F. Hughes, Judge, presiding.

John R. Frost intervened, as owner of property seized in a search warrant proceeding against gaming implements, theretofore in the possession of Jerome Dunn. Judgment was entered, ordering that part of the property seized be destroyed. Frost brings error. Judgment affirmed.

Andrews & Vause, for the plaintiff in error.

H. J. Hamlin, Attorney General (*E. S. Smith, B. D. Monroe*, and *George B. Gillespie*, of counsel), for the People.

MR. JUSTICE CARTWRIGHT delivered the opinion of the court.

Upon complaint in writing, verified by affidavit, a search warrant was issued by the judge of the City Court of the city of Mattoon commanding a search of the building numbered 1816 and 1818 West Broadway, in said city, for gaming apparatus and implements used, kept and provided to be used in unlawful gaming, and directing the arrest of Jerome Dunn, in whose possession said gaming apparatus and implements were alleged to be. The warrant was returned by the sheriff executed by seizing the following chattels found on the second

floor of said building, to-wit: "About 2,500 chips; four poker tables; one stud-poker table; three crap tables; one long table; three packs cards; one faro table and lay-out; 260 dice; one roulette wheel and table; one desk; eighteen chairs; one office chair; four stools," and also by arresting the said Jerome Dunn. Plaintiff in error appeared upon the return of the warrant and was allowed to interplead, and entered his motion to quash the writ and return for the reason that the affidavit upon which the writ was issued did not particularly describe the property to be taken under the search warrant. The motion was overruled and he excepted. He then filed his intervening petition, claiming to be the owner of the property found in the rooms on the second floor of No. 1816, and alleging that the implements and apparatus were not used for gaming at the time they were seized, but were stored in the room and were "knocked down" and not in condition for use. On the hearing of the cause he demanded a jury to try the issues, which was refused by the court, and he excepted. The cause was heard in a summary way by the court, and as to the property claimed by plaintiff in error the court made a finding that the property found in the rooms on the second floor of No. 1816, viz., two crap tables, one faro lay-out and one roulette wheel and table, were gaming implements and had no value or use for any other purpose, and the same were condemned and ordered destroyed. The rest of the chattels found in said rooms on the second floor of 1816 the court found were not in active use for gaming purposes, and being of value for other purposes it was ordered that they be returned to plaintiff in error. The writ of error in this case was sued out to review the judgment against the property ordered to be destroyed.

The judgment being in favor of plaintiff in error except as to the two crap tables, one faro lay-out and one roulette wheel and table, which the evidence showed to be purely gaming apparatus and implements and to have no value or use for any other purpose, the only questions to be considered relate to the alleged errors in seizing them and rendering judgment against them.

The first question relates to the ruling of the court in refusing to quash the writ and return. The complaint charged that the second floor of the building was a place resorted to for unlawful gaming, and that gaming implements and apparatus

were concealed on said second floor of said building occupied by Jerome Dunn. The writ followed the complaint, and the objection made was, that the description of the property to be searched for was not sufficiently definite and particular. The statute authorizes searches for gaming apparatus or implements, and it would not be sufficient to describe the property as goods, wares and merchandise, or as chattels generally. The description must be so particular that the officer charged with the execution of the warrant will be left with no discretion respecting the property to be taken. But we regard the description in this case as sufficiently definite. It includes only apparatus or implements generally used in gambling for staking or hazarding money or other valuable thing to be won or lost. In the case of stolen property or specific articles which can be readily described, great particularity is called for; but there might be much difficulty in giving a particular description of the various gambling devices, and we think more latitude should be allowed in the description. Under the warrant the officer could not take goods or chattels generally, found in the premises, but only apparatus and implements for gaming.

The next alleged error is denying the plaintiff in error a trial by jury. The right to such a trial in the classes of cases in which it was enjoyed before the adoption of the Constitution is preserved inviolate by that instrument, but in all other cases the Legislature may provide for a hearing or trial without a jury. (*Ross v. Irving*, 14 Ill. 171; *Commercial Ins. Co. v. Scammon*, 123 *id.* 601; *City of Spring Valley v. Coal Co.*, 173 *id.* 497.) This case does not belong to any class in which plaintiff in error would have had a right to trial by jury before the adoption of the Constitution. Trial by jury was never a right in summary proceedings, and the Legislature did not violate the Constitution by providing that gaming implements and apparatus should be destroyed, after a hearing, under the direction of the judge, justice or court.

Plaintiff in error says that the implements and apparatus in question were not in use for gambling when seized, and that the only statute making it an offense to have such property in his possession is the act in force June 21, 1895, prohibiting the keeping of any clock, joker, tape or slot-machine, or any other device upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon

the result of which money or other valuable thing is staked, bet, hazarded, won or lost. (Laws of 1895, p. 156.) He claims that section 2 of that act, providing for the destruction of such gambling devices, is unconstitutional and void, for the reason that it provides no way of determining the character of the property, but delegates judicial authority to municipal or other local authorities to determine that question and destroy the property, and that as this proceeding must be under that section the judgment is unauthorized. Division 8 of the Criminal Code provides for searches and seizures of gaming apparatus or implements, and that the thing seized shall be burned or otherwise destroyed under the direction of the judge, justice or court. In *Bobel v. People*, 173 Ill. 19, it was insisted that section 2 of said act of 1895 was unconstitutional for the reason here alleged. The section relating to the destruction of the property was not involved in that case, but in reply to the argument we said that proper proceedings to enforce the section could be had under the general provisions in relation to searches and seizures found in division 8 of the Criminal Code. We adhere to the opinion then expressed. The proceeding under division 8 does not violate any constitutional provision or deprive any one of property without due process of law. The Legislature have determined that gaming implements and apparatus are pernicious and dangerous to the public welfare, and the keeping of them is an offense prohibited by law. They are, therefore, not lawful subjects of property which the law protects, but have ceased to be regarded or treated as property, and are liable to seizure, forfeiture and destruction without violating any constitutional provision. (*Glennon v. Britton*, 155 Ill. 232.) The evidence fully justified the conclusions of the court that the property condemned and ordered to be destroyed had no value or use for any other purpose than that of gambling, and there is no error in the record which calls for a reversal of the judgment.

The judgment is affirmed.

Judgment affirmed.

BRAY V. STATE.

118 Ga. 786—45 S. E. Rep. 597.

Decided October 29, 1903.

SPECIFIC CRIMINAL INTENT—SPECIAL STATUTE: *Necessity to show specific intent, where such is charged—Special statute applicable to the evidence—"Rocking a passenger train."*

FISH P. J. 1. The indictment charged the accused with assault with intent to murder a named person with a rock. Upon the trial the evidence tended to show that the accused wantonly threw a rock, likely to produce death if hitting a person in a vital spot, into a street railroad passenger car, occupied by a number of passengers, one of whom was the person alleged to have been so assaulted, and whom the rock came near striking. It did not appear that the accused knew such person or any of the other passengers, or that he intended to hit any particular person in the car. No one was hit. *Held*, that the evidence did not warrant a verdict of guilty of assault with intent to murder, because it tended to make merely a case of the statutory offense of "rocking a passenger train," as defined in Pen. Code, § 511, and therefore that the court erred in not granting a new trial.

(Syllabus by the Court.)

Supreme Court of Georgia.

Error to the Superior Court, Hall County; Hon. J. J. Kimsey, Judge. (Trial in the court below, September 9, 1903.)

Charley Bray convicted of assault with intent to murder, brings error. Reversed.

J. O. Adams and Hubert Estes, for the plaintiff in error.

W. A. Charters, Solicitor General, for the State.

Judgment reversed.

All the Justices concurring.

McDONALD v. STATE.

28 So. Rep. 750.

Decided May 14, 1900.

WITNESS—INSTRUCTION: *Erroneous instruction, as to the effect of a false statement by a witness.*

The following instruction held to be reversible error:—"If any witness has made statements out of court different and contradictory from those made in court in this case, then you may disregard the whole testimony of such witness or witnesses, if you see proper to do so."

Supreme Court of Mississippi.

Appeal from Circuit Court, Tippah County; Hon. Z. M. Stephens, Judge.

Henry McDonald, convicted of manslaughter, appeals. Reversed.

It appeared by the record:—That previous to the homicide the defendant and the deceased had a difficulty; that, threats against defendant's life were made by the deceased; that, on the night of the homicide, the defendant, while walking home on the street was attacked by the deceased, who struck him with a brick; that defendant then shot and killed the deceased. Defendant testified that deceased attacked him, struck him with a brick, advanced and shot him, when defendant wrenched the pistol from deceased's hand, and shot him with his own pistol. There were no eye witnesses to the homicide. Defendant was sentenced to ten years imprisonment.

C. M. Thurmond, for the appellant.

Monroe McClurg, Attorney General, for the State.

CALHOON, J. In view of the whole record, we cannot permit the judgment in this case to stand because of the first instruction for the State, in these words: "If any witness has made statements out of court different and contradictory from those made in court in this case, then you may disregard the whole testimony of such witness or witnesses, if you see proper to do so." It does not even qualify by requiring the

statements out of or in court to be material. It would operate upon the mind of the average juror as an injunction not to believe anything the defendant said, if some one testified that he anywhere in his testimony contradicted anything he had said outside. It is dangerous thus to experiment on the exploded doctrine of *falsus in uno*, etc. It is of no use, because jurors will be quick anyway to draw proper conclusions from contradictions, and they should not be urged beyond fair grounds. Such efforts to get some advantage from the old doctrine must lead to numerous reversals.

Reversed and remanded.

WHITE V. STATE.

136 Ala. 58—34 So. Rep. 177.

Decided April 9, 1903.

WITNESS—NON-EXPERT TESTIMONY—ARGUMENT OF COUNSEL—IDEM SONANS—PRACTICE: *Witnesses of tender years; one competent and one incompetent—Gordon and Gorden, idem sonans—Statutory provision for listing the residences of jurors merely directory—Improper argument of the prosecuting attorney.*

1. In the indictment the deceased was described as John Gordon, alias Jack Gordon; but the copy served on the accused gave the name as John Gorden, alias Jack Gorden. For this reason the accused objected to going to trial, claiming that he had not been served with a copy of the indictment one entire day before going to trial; *Held*, that the words, Gordon and Gorden, were *idem sonans* and the objection was without merit.
2. The statute directing the jury commissioners to state the residence of each juror on the jury list is merely directory, and it was not necessary that the copy served on the accused should give the residences of the jurors.
3. Two sons of the deceased, the older going on twelve years of age, were introduced as witnesses. From the answers given on the *voir dire*, one held competent, the other not.
4. One of the coroner's jurors who had viewed the body of the deceased, without being shown to be an expert, was permitted to give an opinion as to how long the deceased had been dead. *Held*, error.
5. The fact that the accused's counsel stated to the court in the

presence of the jury that although the defense was that of an *alibi*, that it was proper that the court should instruct the jury as to the bearing of drunkenness in determining the degree of homicide, did not justify the prosecuting attorney in arguing to the jury, that the statement of counsel, was an admission of counsel, that he knew his client to be guilty, and, indicated his lack of faith in the defense.

Supreme Court of Alabama.

Appeal from City Court of Gadsden; Hon. B. Disque, Judge.

Walter White, convicted of murder, appeals. Reversed.

The defendant objected to the case proceeding to trial and moved to quash the venire for the jurors to try the case, for the reason, that a copy of the venire had not been served on him an entire day before the day set for trial; the ground being, that the copy served upon him did not constitute a copy of the special venire, in that it did not show the residences, either of the regular jurors drawn for the week, or, of those drawn specially for the trial. The objection and motion was overruled, and an exception saved.

Upon the trial the accused objected to George Gordon, who was offered as a witness for the State, to which the defendant objected because of his tender years. The court then proceeded to examine the witness on the question of competency. The witness said he was going on twelve years of age and gave several satisfactory answers as to his place of residence and the time he resided there. The examination then proceeded as follows:

"Q. Have you ever been to Sunday school? Ans. No, sir.

"Q. Have you ever been to church? Ans. No, sir.

"Q. What do the think of boys that do wrong? Ans. The bad man will get them.

"Q. What do you think they would do with a boy that swore a lie? Ans. Hang him.

"Q. Do you think that a boy ought to tell the truth or a lie? Ans. The truth.

"Q. Who made you? Ans. Jesus Christ."

The witness was permitted to testify, and defendant excepted. The witness testified that the defendant killed his father, Jack Gordon, by stabbing him with a knife.

Over the defendant's objection and exception, Hubert Gor-

don, another son of the deceased, was permitted to testify. He testified substantially the same as his brother had. His examination on the *voir dire* appears in the opinion.

The inquest was held the day after the homicide, which occurred between ten and twelve o'clock at night. Watson Guest, one of the coroner's jury that had examined the body of the deceased, was introduced as a witness on part of the State, and was asked: "How long, in your judgment, had the man been dead when you saw the body?" To this question the defendant objected on the ground that it called for a conclusion of the witness and not for a statement of fact, and, that the witness was not shown to be an expert qualified to give conclusions. The objection was overruled and an exception saved.

Other evidence was given tending to show that the defendant killed Jack Gordon.

The defendant introduced evidence tending to prove an *alibi*, and the defendant testified that he did not kill the deceased. There was also evidence tending to prove that the defendant was drunk on the night of the homicide. The bill of exceptions contains the following:

"In his argument counsel representing the defendant said to the court, in the hearing of the jury: 'So far as the law of this case is concerned I have, as an officer of this court, only one suggestion to make. Our position is that the defendant did not do this killing; that he was not at Jack Gordon's on the night of the killing. We cannot and do not consider it within the range of possibilities that the jury should find this evidence sufficient to convince them that the defendant was there and did the killing; but nevertheless it is right that the court should instruct the jury with regard to the effect of drunkenness upon the questions of the degree of homicide.' And then counsel for the defendant addressed the jury, insisting that defendant was not guilty of any offense whatever under the evidence. The solicitor, in his closing argument for the State, among other things, said to the jury: 'Counsel for the defendant recognized the weakness of the defendant's case. Who is a better judge of his client's guilt or innocence than the counsel representing him? Counsel knew that under this evidence he could not maintain the innocence of his client, else why did he ask the court to charge the jury upon the law of

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drunkenness as it affects the degree of homicide? It was an admission on his part that he knew his client was guilty.' Counsel for the defendant objected to this argument on the part of the solicitor, called the attention of the court to the argument, and asked the court to exclude the remarks from the jury. The court overruled defendant's objection, and refused to exclude the remarks of the solicitor from the jury. The defendant then and there duly excepted to this action of the court."

Goodhue & Blackwood, for the appellant.

Massey Wilson, Attorney General, for the State.

DOWDELL, J. The appellant was indicted, together with Everett White, for the murder of one Jack Gordon, *alias* John Gordon. A severance was had, and the appellant was tried alone, the trial resulting in a conviction for murder in the second degree.

On the day set for trial, the defendant objected to being put upon his trial, assigning as a ground therefor that he had not been served with a copy of the indictment one entire day before the day of his trial, pursuant to the order of the court. This objection was rested upon the grounds that, in the copy of the indictment served upon him, the name of the person alleged to have been killed was stated to be Jack Gordon, *alias* John Gordon, whereas, in the original, the name of the person alleged to have been killed was stated to be Jack Gordon, *alias* John Gordon. The objection was without merit. The names Gordon and Gorden being *idem sonans*, the copy served was sufficient. *Munkers v. State*, 87 Ala. 96, 6 So. Rep. 357; *Nutt v. State*, 63 Ala. 180.

The motion to quash the special venire on the ground of a variance between the original and the copy served on the defendant was properly overruled by the court. The record and the bill of exceptions show that the orders of the court and the venire served upon the defendant were in compliance with the statute. The sheriff is required to serve a copy of the special venire drawn, together with a copy of the jurors drawn and summoned for the week in which the trial is to be had, when the term of the court is for more than one week, upon the defendant. Code, § 5005; *Burton v. State*, 107 Ala. 108,

112, 18 So. Rep. 284. The ground of variance alleged was the omission, in the copy served, of a statement of the residences of the jurors. The provision of the statute directing the jury commissioners to state, on the list of jurors selected by them, the residences of the persons as selected, is directory merely; and the fact that the slips drawn from the jury box did state the residences did not necessarily require that the copy served on the defendant should contain that information. Code, § 4997; *Childress v. State*, 122 Ala. 21, 30, 26 So. Rep. 162.

An exception was reserved to the ruling of the court on the competency of the witness George Gordon, on his *voir dire* examination. This exception, however, is not insisted on in argument by appellant's counsel. We think the *voir dire* examination clearly demonstrated the competency of this witness, and the court committed no error in admitting him to testify. *McGuff v. State*, 88 Ala. 147, 7 So. Rep. 35, 16 Am. St. Rep. 25; *Grimes v. State*, 105 Ala. 86, 17 So. Rep. 184; *Williams v. State*, 109 Ala. 65, 19 So. Rep. 530.

We are, however, of a different opinion as to the correctness of the city court's ruling upon the competency of the witness Hubert Gordon. This witness was a child of tender years; the record does not disclose his exact age, only that he was younger than his brother, George Gordon, who was "going on twelve years." On his examination *voir dire*, the following questions were asked and responses made:

"Q. How old are you? Ans. Don't know.

"Q. Where do you live? Ans. Jail.

"Q. Did you ever go to Sunday school or church? Ans. No.

"Q. Who made you? Ans. Don't know.

"Q. What becomes of bad boys when they die? Ans. Bad-man get 'em.

"Q. What becomes of good boys when they die? Ans. Don't know.

"Q. Is it right or wrong to tell a lie? Ans. Wrong.

"Q. Do you know where the 'chicken farm' was? Ans. No.

"Q. Is there any town near the 'chicken farm'? Ans. No, sir.

"Q. How about Attalla; is it near there? Ans. Attalla is way off yonder.

"Q. Did any one ever tell you about God or Jesus Christ?
Ans. No.

"Q. Do you know what becomes of good little boys when they die? Ans. No.

"Q. Did you ever hear anything about Heaven? Ans. No, sir.

"Q. Who made you, Hubert? Ans. The Lord.

"Q. Where will you go if you swear a lie? Ans. Bad man get me.

"Q. What becomes of good little boys that die? Ans. Don't know.

"Q. Do you know anything about boys being put in jail for swearing lies? Ans. No, sir.

"Q. Do you know what ought to be done with boys that swear lies? Ans. No, sir.

"Q. When you held up your hand awhile ago did you know what was being done? Ans. No, sir.

"Q. Do you know what it is to be sworn? Ans. No, sir.

"Q. Is it right or wrong to tell a lie? Ans. Wrong.

"Q. Do you know what ought to be done with a boy that swears a lie? Ans. No, sir."

There was evidence in the case that the "chicken farm" was the place where the alleged murder was perpetrated, and that the witness Hubert was living there at the time with his father, the deceased, and that the "chicken farm" was within half a mile to a mile of the town of Atalla. We think the foregoing examination demonstrated that degree of intellectual and moral deficiency which would render the party incompetent to testify as a witness. He clearly had no conception of the solemnity of an oath, and did not as much as know what it was to be sworn. He was wanting in that religious training and instruction which excites a hope of future reward to the good, and a fear of punishment to the wicked, and he was without any knowledge of the punishment visited by the law of the land for false swearing. As was said in *McKelton v. State*, 88 Ala. 181, 7 So. Rep. 38: "The rule is that persons who have no comprehension of the nature and obligation of an oath, and are incapable of appreciating their responsibility for its violation, should not be admitted as witnesses; and this without regard to the cause from which the defect has arisen, and hence without reference to the age of the witness." While recogniz-

ing the rule that, in passing upon the capacity of children of tender years to testify, much must be left to the sound discretion of the trial court, and that it is only in strong cases the ruling of the court admitting them as witnesses should be reversed, we are of the opinion in the present case, and feel so constrained to hold, that the court erred in admitting the witness Hubert Gordon to testify. *McKelton v. State*, 88 Ala. 181, 7 So. Rep. 38; *Beason v. State*, 72 Ala. 191; *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4; *State v. Michael*, 37 W. Va. 570, 16 S. E. 803, 19 L. R. A. 605.

The general rule is that a non-expert witness should not be permitted to testify his opinion, but should be confined to a statement of the facts, the jury being as capable, after hearing the facts, of the formulation of an opinion as the witness is. The question asked the witness Guest, and in answer to which he gave his opinion, called for matter of expert knowledge; that is, how long the deceased had been dead when witness saw him. The witness was not shown to be an expert, nor is it pretended that he was. The court erred in permitting him to state his opinion against the objection of the defendant.

In other rulings upon the admission and rejection of testimony, we think the action of the court was free from error.

The remarks of the solicitor in his closing argument to the jury, which were objected to by the defendant, were improper, and should have been arrested by the court on motion of defendant.

For the errors pointed out, the judgment will be reversed, and the cause remanded.

STATE V. CRACKER.

65 N. J. L. 410—47 Atl. Rep. 643.

Decided November 12, 1900.

WITNESS: *Competency of twelve-year old boy—Discretion of the trial judge.*

1. Whether a child is of proper age and competent to testify is a matter for inquiry by the court, and rests largely in the discretion of the trial judge; and, if there be evidence from which

the trial judge may find capacity, the exercise of judicial discretion should not be disturbed.

2. A boy of 12 years of age, who says that he attends Sunday school, and that not to tell the truth is a sin, and that, if he does not tell the truth, he will be put in the reform school; and who, in answer to the question: "Do you expect to live forever?" says: "No, sir;" and in answer to the question: "After you have done living, what becomes of you?" says: "Then I shall go to Heaven;" and in answer to the question: "Suppose you have not been entirely good; what becomes of you then?" says: "Then I shall go to Hell"—expresses what is usually considered orthodoxy, and has a comprehensive idea of the rewards and punishments incident to honest and dishonest living, and was rightly admitted to testify.

(Syllabus by the Court.)

Supreme Court of New Jersey.

On error to the Quarter Sessions of Mercer County.

Nicola Cracker, convicted, brings error. Affirmed.

Argued November Term, 1900, before the CHIEF JUSTICE and GUMMERE, LUDLOW, and FORT, JJ.

John A. Montgomery, for the plaintiff in error.

William J. Crossley, for the State.

FORT, J. In this case the second assignment of error raises one of the same questions determined at this term in *State v. Goldman*, 65 N. J. Law 394; 47 Atl. Rep. 641, as to the effect of the refusal of the judges to arrest the judgment after conviction, upon the ground that the indictment was returned to the Oyer and Terminer by a grand jury sworn in the sessions, and is upon exactly the same state of facts as were involved in that case; and we find no error, for the reasons there given.

The third assignment of error in this case is also similar to the third, fifth and sixth assignments, which were not sustained in *State v. Goldman*, and are not sustained here, for the same reasons.

The only remaining exception in this case is one that was taken to the ruling of the court allowing Michael Bender, a lad of 12 years of age, to be sworn. Whether a child is of proper age and competent to testify is a matter of inquiry by the court, and rests largely in the discretion of the trial judge, and, if there be evidence from which the trial judge may find capacity to be a witness, the exercise of judicial discretion

should not be disturbed. 1 Greenl. Ev. § 367; 2 Tayl. Ev. (pt. 1), p. 1170, § 1377. In this case, however, there can be no question, as the evidence satisfies this court that the lad sufficiently understood the nature of an oath and the consequences incident to false testimony. The boy under examination, to ascertain whether he should be sworn, was asked and answered the following questions:

"Q. Do you know what it is to take an oath? A. No, sir.

"Q. Do you go to Sunday school? A. Yes, sir.

"Q. Do you know what will happen to you if you do not tell the truth? A. Yes, sir.

"Q. What will happen? A. It is a sin.

"Q. Have you any idea as to the punishment which will follow, if you do not tell the truth? A. Yes, sir.

"Q. What? A. They will put me in the reform school.

"Q. After you die do you know what happens? Do you expect to live forever? A. No, sir.

"Q. After you have done living what becomes of you then? A. Then I shall go to Heaven.

"Q. Suppose you have not been entirely good, what becomes of you then? A. Then I shall go to Hell."

It seems to me that this youth, judged by what is ordinarily considered orthodox, had a comprehensive idea of the rewards and punishments incident to honest and dishonest living, and in addition knew clearly what punishment the law inflicted for perjury, viz.: confinement in the reform school. The examination of the boy by the court and counsel, taken as a whole, justified the court in admitting him to be sworn and to testify.

There is no error found in this case, and the judgment is affirmed.

NOTE (By J. F. G.)—Wherever a religious test is not required as to adult witnesses, intelligence and moral development alone should be the test as to the competency of youthful witnesses. Human emotions, prejudices, likes and dislikes operate on the minds of us all, accentuating those facts which address themselves most favorably to us. A moral desire to express the truth does not alone bring it forth; but, without intelligent discrimination we are liable to err, even as to ocular observations.

The test of orthodoxy is gradually losing ground, and it is now generally conceded, in business centers, that among those of the most strict business integrity, and whose reputations for veracity are unimpeachable, many are found who neither adhere to nor have any faith in orthodox beliefs.

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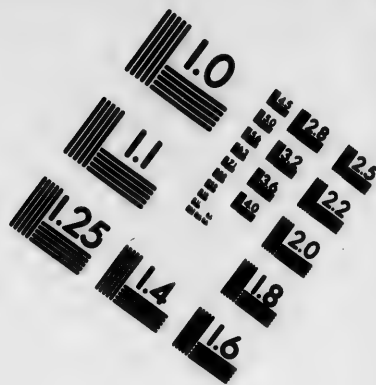
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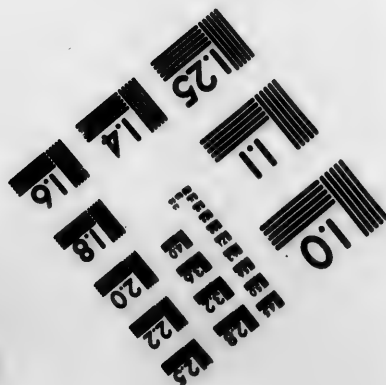
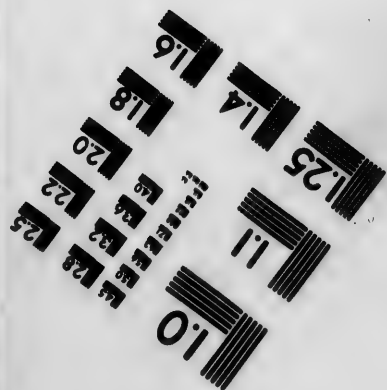
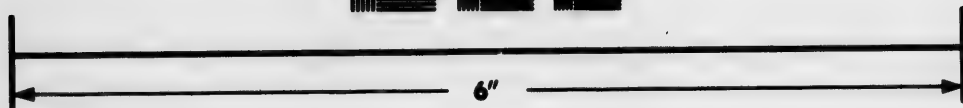
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